79-395

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA, PETITIONER

*v.*

HAZEL MORRISON

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

The opinions of the court of appeals (App. A, *infra*, 1a-11a; App. C, *infra*, 14a-25a) are not yet reported.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 12a-13a) was entered on May 10, 1979, and

a petition for rehearing was denied on July 10, 1979 (App. C, *infra*, 14a). On July 30, 1979, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether dismissal of an indictment with prejudice is an appropriate sanction for law enforcement officers' misconduct that did not injure respondent in any way.

## STATEMENT

In an indictment filed in June 1978 in the United States District Court for the Eastern District of Pennsylvania, respondent was charged with two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Under an agreement with the government, she pleaded guilty to one count but reserved the right to appeal the district court's denial of her motion to dismiss the indictment. She was sentenced to five years' imprisonment, to be followed by a three-year special parole term.

Before entering her plea, respondent moved to dismiss the indictment on the ground that agents of the Drug Enforcement Administration had improperly visited and interviewed her after her indictment in the absence of defense counsel. She alleged that this conduct violated her Sixth Amendment right to the effective assistance of counsel and a fair trial. Fol-

lowing an evidentiary hearing, the district court denied the motion.

1. The evidence presented at the hearing showed that on the afternoon of August 23, 1978, DEA agents Stephen Hopson and James Bradley visited respondent at her residence in an effort to obtain her cooperation in their investigation of a major heroin dealer. Before he and Agent Bradley went to see respondent, Agent Hopson discussed her case with Dennis Malloy, the DEA Agent primarily responsible for the investigation that led to respondent's arrest and indictment (App. A, *infra*, 3a).[1] Agent Malloy knew that Agent Hopson hoped to secure respondent's assistance, and he permitted Hopson to examine the file on her case (*ibid.*). Although Agents Hopson and Bradley knew of the criminal charges pending against respondent, they did not notify her attorney or the United States Attorney's office that they wished to interview her (*id.* at 3a-4a). Instead, they simply went to her house and questioned her about the source of her heroin during the period prior to her arrest. They told her that she faced a lengthy jail sentence and that, if she cooperated in their investigation, they would make a favorable sentencing recommendation to the United States Attor-

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[1] At the time he spoke with Agent Hopson, Agent Malloy knew that respondent was represented by retained defense counsel. As early as May 31, 1978, Agent Malloy and an Assistant United States Attorney had met with respondent's attorney for negotiations concerning the charges that would be filed against her (App. A, *infra*, 3a).

ney. They also told her about the government's protection plan for informants (*id.* at 4a).[2]

Agent Hopson asked respondent whether she was represented by private counsel or by an attorney from the public defender's office. When she identified her retained counsel, Agent Hopson inquired how much she had paid him. Respondent said that she had paid him $200. Agent Hopson replied that he had seen the attorney's work in connection with another case in the past, and he suggested that respondent think about the kind of legal representation she could expect for the amount of money she was paying.[3] Agent

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[2] Respondent testified that the agents warned her that the trial judge in her case was "the worst SOB in the federal courtroom" (App. A, *infra*, 4a n.3; Tr. 113). The agents testified that they did not recall the specifics of this conversation, and they were never directly asked whether they had referred to the trial judge in such derogatory terms (App. A, *infra*, 4a n.3; Tr. 8-30, 42-47, 93-104).

[3] Respondent testified (Tr. 112-113) that Agent Hopson told her that her lawyer could not do anything for her and that all he wanted was her money. According to respondent, the agent warned that "[i]f you decide to fight your case, your lawyer is going to make a[n] asshole out of hisself [*sic*] and you, too, in the courtroom." Respondent's son and sister also testified that Agent Hopson referred to respondent's attorney as an "asshole" (Tr. 152-156, 161). Agent Hopson's account of the conversation did not include any mention of such an epithet, and he was not asked directly whether he had used the term. On direct examination by the Assistant United States Attorney, Agent Hopson was asked, "Did you make any comments specifically concerning [respondent's attorney]?" He replied, "I don't recall. I said that I was a case agent against [him] in the past. I don't recall any further representation. I may have; I may not have" (Tr. 89-90).

Hopson also recommended that respondent seek the assistance of a public defender if she wished to cooperate with the DEA (App. A, *infra*, 4a; Tr. 89-90). Respondent did not give the DEA agents any information concerning her own case or the heroin dealer under investigation by Agents Hopson and Bradley. Agent Hopson left his telephone number with respondent, and the agents departed.

Respondent immediately called her attorney, and he went to her house. While he was there, respondent called Agent Hopson and arranged a meeting for the following day (App. A, *infra*, 4a). Agent Hopson did not appear at the appointed hour, but he did visit respondent's house several hours later. When he arrived, respondent told him that she had company and therefore could not talk (App. A, *infra*, 4a; Tr. 125, 155). Promising to call later in the evening, Agent Hopson left. That night, between 9 and 10 p.m., Agent Hopson called respondent to arrange an appointment for the next day, August 25 (Tr. 126, 142-144). Respondent testified that she told Agent Hopson that she wished to have her attorney present at such a meeting and that the morning hour proposed by the agent was inconvenient because she had a dental appointment (Tr. 44, 142-144).

The record does not show whether respondent and Agent Hopson agreed on a time for a meeting the next day, but, in any event, Agents Hopson and Bradley did visit respondent's house again on August 25, 1978. The conversation between them and respondent was similar to the one that had occurred

two days earlier (App. A, *infra*, 5a; Tr. 45). Respondent told the agents that she had nothing to say and would speak with them only in the presence of her attorney (Tr. 97, 126-127). The agents were annoyed, because they believed respondent's telephone call to Agent Hopson the previous afternoon meant that she was willing to cooperate with the DEA investigation. Agent Bradley testified (Tr. 102-103): "[B]oth of us actually were perturbed, not [to] the point of raising our voices, but we were disappointed and a little bit angered that we had to make a worthless trip out there." Agent Bradley told respondent that any further discussions would take place in the United States Attorney's office in the presence of her attorney (Tr. 97, 103). He then left the house, and Agent Hopson followed a few minutes later (Tr. 102, 129).[4]

2. Six days later, on August 31, 1978, respondent entered into a conditional plea agreement with the United States Attorney. She agreed to plead guilty to the first count of the indictment, and the government agreed to dismiss the second count. She agreed to withdraw her remaining pretrial motions in the event the district court denied her motion to dismiss on the basis of the DEA agents' misconduct, and the

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[4] Respondent testified (Tr. 129) that after Agent Bradley left the house, Agent Hopson stated that her "goddamn ass [would be] going to jail" and that the trial judge to whom her case was assigned "hate[s] black people." Agent Hopson recalled the August 25 conversation only in general terms, and he was not asked about the specific remarks attributed to him by respondent later in the hearing (Tr. 42-47).

government agreed that she could reserve her right to appeal such a denial, notwithstanding her guilty plea (Tr. 183-185, 196-197).

The district court denied respondent's motion to dismiss (Tr. 183), and respondent formally entered her plea of guilty. In the ensuing Rule 11 proceeding (Tr. 192-202), respondent admitted that on April 12, 1977, she sold 26.56 grams of heroin to a government informant for $1600. She also expressed agreement with the informant's statement that he had purchased heroin from her on numerous previous occasions and that, while her husband was in prison, she ran their heroin business from her home. Throughout the plea bargaining with the United States Attorney's office and the subsequent Rule 11 proceeding, respondent was represented by the same attorney who had represented her since the spring of 1978, before the indictment against her was returned by the grand jury.

3. The court of appeals reversed and directed the district court to dismiss both counts of the indictment with prejudice (App. A, *infra*, 1a-11a). The court acknowledged that the district court had not made any findings of fact in connection with respondent's motion to dismiss (*id.* at 2a n.2); it ruled, however, that dismissal of the indictment was justified solely on the basis of the undisputed facts and the testimony of the government's witnesses taken at face value (*ibid.*). The court did not disagree with the government's contention that respondent was not prejudiced by the DEA agents' misconduct in this case. Indeed, the court explicitly stated (*id.* at 11a) that "the im-

portuning of the government agents [was] unsuccessful" and did not result in respondent's abandoning her counsel or providing information useful to the prosecution. Nonetheless, the court held that the indictment should be dismissed because of the agents' "deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial" (*ibid.*). The court observed that violations of the Sixth Amendment frequently may be remedied by the suppression of evidence obtained as the result of the misconduct or by the ordering of a new trial where a conviction has been tainted in some way by government interference with the attorney-client relationship (*id.* at 8a). Here, however, the agents' error "is not amenable to remedy through suppression or reversal of conviction" (*id.* at 10a). For that reason, the court concluded, dismissal of the indictment is an appropriate sanction.

On the government's petition for rehearing, three judges of the court of appeals voted to grant rehearing en banc (App. C, *infra*, 15a-25a).

In a dissent joined by Judge Rosenn, Judge Garth stated that "the extreme sanction of dismissing the indictment" should not be imposed simply because "the panel cannot think of an appropriate sanction to correlate with the non-prejudicial, albeit inexcusable, conduct of the government in this case" (*id.* at 18a). Stressing that respondent did not show or even claim that she was prejudiced by the government's misconduct (*id.* at 21a), Judge Garth warned that

"as a result of the panel's decision, a defendant finding himself in this situation may be better off by alleging no prejudice than by claiming he was harmed by the government's misconduct. In the latter case, he may be granted a new trial or if he has pled guilty, his plea may be vacated. But if he succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*id.* at 22a).

Judge Garth stated (App. C, *infra*, 22a-23a) that he agreed with the analysis of the Second Circuit in *United States* v. *Broward*, 594 F. 2d 345, cert. denied, No. 78-1535 (June 18, 1979). There, the court of appeals held that dismissal of an indictment is generally not an appropriate remedy when no prejudice is shown. The court said that in the absence of prejudice, dismissal should be considered, if at all, only in "the truly extreme cases," for example, a case in which such a drastic remedy is necessary "to deter a pattern of demonstrated and longstanding widespread or continuous official misconduct" (*id.* at 351). Because there was no allegation or proof of "widespread, routine, constant or continuous" government misconduct in this case, Judge Garth concluded (App. C, *infra*, 24a) that the public should not be "punished for the misconduct of a government agent" when that misconduct did not harm respondent.

Judge Adams voted for rehearing en banc (App. C, *infra*, 24a-25a) because he viewed the question presented as "sufficiently important to warrant the attention of the full Court" and because the *Broward*

decision "was not brought to the attention of the panel before its opinion was filed."

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is incorrect and, if permitted to stand, will result in the release of an admittedly guilty defendant who was not prejudiced in any way by the government misconduct of which she complains. Moreover, the court of appeals' ruling can be expected to produce significant delay in a substantial number of future criminal cases, in which defendants will be encouraged to seek dismissals of their indictments on the basis of alleged constitutional violations that caused them no injury. The panel's decision finds no support in the rulings of this Court and directly conflicts with the approach adopted by every other federal circuit that has considered the question here presented. This Court should grant review to restore uniformity on this important point of criminal procedure and to establish that, except perhaps in extraordinary cases of flagrant and repeated government misconduct, an indictment should not be dismissed unless that is the only way to cure harm that a defendant has suffered as the result of an official infringement of his constitutional rights.[5]

1. In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), this Court declined to find a violation of the

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[5] The filing of a petition for a writ of certiorari in this case is, of course, not intended to imply any approval or condoning of the DEA agents' conduct condemned by the court of appeals.

right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, even though an undercover state police agent was present at meetings between a criminal defendant and his attorney. The Court emphasized that the agent's intrusion did not produce any evidence used against the defendant at trial and did not result in the communication of defense strategy to the prosecution (*id.* at 558). Because the agent's attendance at the meetings did not have any effect on the defendant's trial and conviction, the Court held that the defendant had not suffered any deprivation of his constitutional rights. *Weatherford* thus indicates that some showing of prejudice is a prerequisite to a finding that alleged government misconduct violated the Sixth Amendment.

Respondent in the present case was not harmed in any way by the DEA agents' conversations with her outside the presence of counsel. As Judge Garth said in his dissent from the denial of rehearing en banc (App. C, *infra*, 21a; emphasis in original), "this case presents a situation where there has been *no showing* whatsoever that [respondent] has been prejudiced by the government's misconduct. There is no claim that confidential attorney-client communications were revealed to the government as a result of the conduct of the D.E.A. agents. Nor is there any claim that [respondent's] confidence in her attorney was undermined by governmental conduct, or that her guilty plea was induced by it." In the absence of some show-

ing of prejudice, *Weatherford* suggests that no constitutional violation occurred.

The court of appeals, however, emphasized (App. A, *infra*, 6a-8a) one aspect of the facts in *Weatherford* that is not present here. In the earlier case, the undercover officer's passive attendance at a meeting between the defendant and his attorney was motivated by a desire to maintain the agent's secret identity and thus to preserve his effectiveness as an undercover investigator. The Court recognized "the unfortunate necessity of undercover work" (429 U.S. at 557) and observed that the officer attended the meeting only in order to avoid raising suspicion and only at the invitation of the defendant and his lawyer. The Court concluded that there had been no "purposeful intrusion" (*id.* at 558) into the attorney-client relationship. Here, by contrast, the DEA agents deliberately visited respondent, apparently made disparaging remarks about her attorney, and suggested she obtain new counsel if she wished to cooperate with the government's investigation. The court of appeals ruled (App. A, *infra*, 6a-7a; emphasis in original) that

> *Weatherford* applies * * * when there is *both* no prejudice to defendant's case *and* no wrongly motivated intrusion into the attorney-client relationship. * * * In the case of a deliberate attempt actually to sever or otherwise to interfere with the attorney-client relationship, a much more explicitly intrusive offense, the analysis must proceed differently.

The court held that because the agents intended to affect respondent's relationship with her attorney, their conduct did infringe the constitutional right to counsel (*id.* at 7a).

But, as the court of appeals itself acknowledged (App. A, *infra*, 10a), this is not the end of the case. Even if the panel is correct that *Weatherford*, properly read, permits the finding of a Sixth Amendment violation whenever a wrongly motivated government agent seeks to intrude on the attorney-client relationship, the question of remedy remains. And this is where the court of appeals' error is most serious.

Courts ordinarily tailor the relief awarded in particular situations to fit the harm incurred. For example, when incriminating evidence is obtained as a result of improper police questioning of a defendant in the absence of counsel, the evidence is suppressed. See, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964). Likewise, when government agents improperly overhear pretrial conversations between a defendant and his lawyer, and the defendant is subsequently convicted, a new trial may be ordered to ensure that the conviction is not based on wrongfully obtained information. *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Alternatively, the district court may be required to conduct a hearing on the effect of the intrusion on the fairness of the defendant's trial and to order a new trial if it determines that the conviction is tainted by the interference with the attorney-client relation-

ship. See *Black* v. *United States*, *supra*, 385 U.S. at 29-31 (Harlan, J., dissenting); *O'Brien* v. *United States*, *supra*, 386 U.S. at 345-347 (Harlan, J., dissenting).[6] Similarly, when a criminal defendant alleges that he has received ineffective assistance of counsel, the reviewing court will examine the record and grant a new trial if it appears that the defendant was prejudiced by counsel's acts or omissions or if the record does not permit an accurate evaluation of the consequences of the conduct of which the defendant complains. *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331-1332 (9th Cir. 1978) (en banc), cert. denied, No. 78-6157 (Mar. 26, 1979).[7]

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[6] In an extreme case, where the taint cannot be purged by a new trial (*e.g.*, where the government has learned of confidential defense strategy and the court has no way to ensure that the government will not use this information in preparing for a second trial), a court may order dismissal of the indictment to remedy a Sixth Amendment violation. See, *e.g.*, *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978).

[7] For example, when no counsel is provided or when counsel is prevented from discharging his normal functions, a reviewing court may be unable to assess the extent of the injury suffered. In such instances, a new trial may be ordered even without a showing of specific harm. See, *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (defense counsel prevented from consulting with his client during an overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (counsel denied the opportunity to make a summation of evidence before the rendition of judgment); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (indigent defendant denied the assistance of counsel in felony trial); *Glasser* v. *United States*, 315 U.S. 60 (1942) (defendant's retained counsel appointed by the court to represent a co-defendant as well).

A comparable remedial pattern has emerged in cases involving alleged violations of constitutional rights other than the right to counsel guaranteed by the Sixth Amendment. The suppression of evidence discovered or seized in violation of the Fourth Amendment or obtained in violation of a defendant's Fifth Amendment privilege against compulsory self-incrimination is a familiar feature of modern criminal trials. And, of course, if such evidence is mistakenly admitted at trial and contributes significantly to the defendant's conviction, he will be granted a new trial at which the tainted evidence will be excluded.

This Court has never suggested, however, that a defendant who has suffered no prejudice whatsoever is entitled to a dismissal of the indictment against him as a remedy for a constitutional violation, whether the government misconduct is intentional or inadvertent.[8] A party who has not been injured is

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[8] Indeed, in the Fifth Amendment context, the Court stated in *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (footnote omitted):

> Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * * Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

not ordinarily entitled to any remedy at all.[9] Whatever remedies respondent may have against the DEA agents who criticized her attorney or against the government as the agents' employer,[10] there is no

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[9] This is the general principle underlying the Court's ruling in *Chapman* v. *California*, 386 U.S. 18, 24 (1967), that even errors of constitutional proportion may be harmless. See *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (remanding for harmless error determination concerning the introduction at trial of evidence derived from a pretrial corporeal identification at which defendant was improperly denied the assistance of counsel); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (in light of other evidence of guilt, admission of pretrial confession allegedly obtained in violation of constitutional right to counsel was harmless error); *United States* v. *Wade*, 388 U.S. 218, 242 (1967) (use of in-court identifications at trial may be harmless error even if tainted by pretrial lineup improperly conducted without notice to and outside the presence of defense counsel).

[10] Relying on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), respondent may be able to state a cause of action for damages against the DEA agents on the basis of their alleged Sixth Amendment violations. App. C, *infra*, 19a n.2, 22a n.4; *Davis* v. *Passman*, No. 78-5072 (June 5, 1979). *Weatherford* itself was a damage suit, brought under 42 U.S.C. 1983, against the state undercover officer and another state official who was allegedly responsible for the intrusion of a police agent into the meeting between a criminal defendant and his attorney. See also *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972). On August 22, 1979, respondent filed a complaint in the United States District Court for the Eastern District of Pennsylvania, seeking $10,000 compensatory damages and $100,000 punitive damages against the DEA and Agents Hopson, Bradley, and Malloy for their roles in the incidents now under consideration. The suit potentially presents several difficult factual and legal questions, *e.g.*, whether respondent will be able to prove actual damages even though she suffered no prejudice in her criminal case; whether punitive damages

reason why she should be awarded relief in the pending criminal proceeding against her, a proceeding that was not affected in any way by the agents' behavior. There is certainly no reason why she should

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should be available in the absence of substantial actual damages; whether punitive damages are ever available in a *Bivens* action; whether federal law (the law that presumably governs *Bivens* actions) should adopt a punitive damages standard derived from state law or should develop its own common law standard. But however these questions may be resolved, the propriety of the court of appeals' dismissal of respondent's indictment will not be affected. That remedy remains inappropriate, regardless of whether other relief is available.

We note for the Court's information that the 95th Congress considered proposed legislation that would make a claim against the United States the exclusive civil remedy for many kind of wrongful acts that may be performed by federal employees acting within the scope of their employment. See H.R. 9219, S. 2117, 95th Cong., 1st Sess. (1977). The bills provided that, with respect to constitutional tort claims, the United States would be liable for liquidated damages of $1,000, in the absence of proof of actual damages in a greater amount. See *Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 95th Cong., 2d Sess. 2 (1978). Similar legislation has recently been introduced in the 96th Congress (H.R. 2659), and the House Judiciary Committee held hearings on the bill on June 20, 1979.

In addition, of course, although respondent will not benefit directly from such action, the DEA agents involved in this case are subject to possible imposition of departmental disciplinary measures. App. C, *infra,* 22a n.4. DEA officials have informed us that sanctions directed against Agent Hopson, including possible temporary suspension, are now under consideration, and a final departmental decision is expected within 30 days.

be entitled to the drastic remedy of dismissal of the indictment with prejudice. The DEA agents' improper visits and conversations with respondent in August 1978 were not part of the criminal acts she performed in April and May 1977 [11] and did not contribute to the government's ability to prosecute her for those offenses. Accordingly, if respondent can successfully claim any relief, she must do so in some proceeding separate from her criminal prosecution.

In his dissent from the court of appeals' denial of rehearing en banc, Judge Garth cogently exposed the logical flaws in the panel's reasoning. He explained that the court's finding of a constitutional violation does not lead inevitably to the conclusion that the indictment should be dismissed. On the contrary, "dismissal of the indictment is appropriate when the harm to the defendant cannot effectively be cured by less drastic means" (App. C, *infra*, 21a; see note 6, *supra*). The court's decision, in Judge Garth's words, "turns [this rule] on its head" (App. C, *infra*, 21a). The indictment is dismissed, not because the court cannot conceive of any other way to remedy the in-

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[11] Cf. *Hampton* v. *United States*, 425 U.S. 484 (1976), in which petitioner contended that the Due Process Clause of the Fifth Amendment barred his conviction because law enforcement officers were excessively involved in the criminal enterprise. The plurality opinion stated (425 U.S. at 490): "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."

jury suffered by respondent, but because respondent was not injured and the court therefore cannot imagine any other remedy that is available. The consequences, as Judge Garth observed (*id.* at 22a), are little short of absurd. Not only is a criminal defendant immunized although government misconduct has caused her no harm, but further defendants are taught they "may be better off by alleging no prejudice" than by complaining of the injury suffered as the result of a constitutional violation (*ibid.*). In the latter event, the most likely remedies are the suppression of evidence, a new trial order, or an order vacating a tainted guilty plea. But, if a defendant "succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*ibid.*).

2. The decision of the court of appeals authorizes the dismissal of an indictment in circumstances that would not justify such a remedy under the standards established by several other circuits. Because allegations of government misconduct usually arise in distinctive factual situations, it is not certain that the court of appeals' approach in this case would lead to different results in cases that have already been decided elsewhere. But it is clear on the basis of the published opinions that every other court of appeals that has considered the matter would not order dismissal of an indictment on the facts of the present case.

The Second Circuit has recently held that dismissal of an indictment is an appropriate sanction only in

truly extreme cases where there is "a need either to eliminate prejudice to a defendant in a criminal prosecution, where it [is] impossible to do so by imposition of lesser sanctions, or to deter a pattern of demonstrated and longstanding widespread or continuous official misconduct." *United States* v. *Broward*, 594 F.2d 345, 351, cert. denied, No. 78-1535 (June 18, 1979). See also *United States* v. *Fields*, 592 F.2d 638, 648 (2d Cir. 1978), cert. denied, Nos. 78-1474, 78-1480, and 78-1483 (June 4, 1979); *United States* v. *Brown*, No. 79-1011 (2d Cir. July 13, 1979), petition for cert. pending, No. 79-5236.[12]

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[12] The government's briefs in opposition in *Broward* and *Fields* were filed within three weeks of the court of appeals' decision in the present case and did not mention the ruling now under discussion. The Second Circuit cases did not involve alleged interferences with the attorney-client relationship. Petitioner in *Broward* argued that his indictment should have been dismissed because of misstatements in the affidavit supporting the warrant for his arrest and alleged perjury by government agents at a pretrial suppression hearing. Petitioners in *Fields* contended that their indictment should have been dismissed because attorneys at the Securities and Exchange Commission concluded a settlement with petitioners in a civil injunctive proceeding without disclosing that they had urged the United States Attorney to conduct a criminal investigation of the same transactions. While the court of appeals in the present case has dismissed an indictment in circumstances that would lead other circuits to find that remedy inappropriate, the court has not held that every instance of deliberate government misconduct in connection with a criminal defendant will call for dismissal. Accordingly, even though there is a conflict regarding the appropriate standard for evaluating requests for dismissal based on nonprejudicial government misconduct, it is by no means clear that the Third Circuit would have reached a different result

Similarly, the Seventh Circuit has ruled that an indictment should not be dismissed when the defendants "have shown no prejudice, and no continuing abuse of the criminal processes." *United States* v. *Stanford*, 589 F.2d 285, 299-300 (7th Cir. 1978), cert. denied, No. 78-6041 (Apr. 2, 1979). The Fifth, Eighth, and Ninth Circuits also have agreed that a showing of prejudice is critical either to establish a Sixth Amendment violation or to justify a dismissal of an indictment. See *United States* v. *Acosta*, 526 F.2d 670, 674 (5th Cir.), cert. denied, 426 U.S. 920 (1976); *United States* v. *Crow Dog*, 532 F.2d 1182, 1196-1197 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Glover*, 596 F.2d 857, 861-864 (9th Cir. 1979), petition for cert. pending, No. 78-6865; *United States* v. *Owen*, 580 F.2d 365, 367-368 (9th Cir. 1978). See also *United States* v. *Franklin*, 598 F.2d 954, 957 (5th Cir. 1979), petition for cert. pending, No. 79-250; *United States* v. *Jernigan*, 582 F.2d 1211, 1213-1214 (9th Cir.), cert. denied, No. 78-5627 (Nov. 27, 1978). But cf. *United States* v. *McCord*, 509 F.2d 334, 348-351 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975) ("serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indict-

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in *Broward* or *Fields*, where the alleged misconduct was arguably less egregious and did not infringe the Sixth Amendment right to the effective assistance of counsel. For this reason, we believe that, even if the Court were to undertake review here, there is no need to hold *Broward* and *Fields*, both of which are now at an interlocutory stage, for the disposition of this case.

ment or a new trial, without regard to prejudice to the accused," but "prejudice, actual or potential, is relevant" (509 F.2d at 349, 350) to the determination).

3. Finally, review should be granted in this case because, if left undisturbed, the opinion of the court of appeals may perceptibly increase the already heavy burdens on the federal criminal justice process by giving rise to a large number of motions alleging no prejudice but seeking dismissal of an indictment on the ground that government officials allegedly engaged in misconduct, either after the indictment as here, or during the investigation that preceded the indictment. The factual hearings on such motions will delay the speedy disposition of criminal cases, even if the district courts seldom find the remedy of dismissal to be appropriate.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

PHILIP B. HEYMANN
*Assistant Attorney General*

PETER BUSCEMI
*Assistant to the Solicitor General*

SIDNEY M. GLAZER
*Attorney*

SEPTEMBER 1979

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 78-2258

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UNITED STATES OF AMERICA, APPELLEE

*v.*

MORRISON, HAZEL, APPELLANT

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Appeal From the United States District Court
for the District of Eastern Pennsylvania
D.C. Crim. No. 78-00193

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Argued February 22, 1979

Before HUNTER, WEIS, *Circuit Judges*, and
MARKEY, *Chief Judge*, of the Court of Customs
and Patent Appeals *

Opinion Filed May 10, 1979

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Salvatore J. Cucinotta (Argued)
Attorney for Appellant
William E. Ball (Argued)
Peter F. Vaira
Walter S. Batty, Jr.
Bonnie Brigance Leadbetter
Attorneys for Appellee

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

## OPINION OF THE COURT

HUNTER, *Circuit Judge*:

1. On June 28, 1978, the Appellant, Hazel Morrison, was indicted on two counts of illegally distributing heroin in violation of 21 U.S.C. § 841(a)(1) (1976). Prior to trial, she filed a Motion to Dismiss the Indictment with Prejudice, alleging denial of her sixth and fourteenth amendment right to effective assistance of counsel and her fourteenth amendment right to a fair trial. The motion to dismiss was heard in the United States District Court for the Eastern District of Pennsylvania and was denied without opinion. Immediately after the announcement of the district court's decision denying the motion, Morrison entered an opinion conditional plea of guilty to one count of distribution.[1] She was subsequently sentenced to five years imprisonment, with a special parole term of three years to follow.

2. The record in this case shows that agents of the Drug Enforcement Agency effected a willful and unjustified interference with Mrs. Morrison's sixth amendment right to counsel.[2] We conclude that both

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[1] The guilty plea was contingent upon appeal of the district court's ruling to this Court. We approved the use of the conditional guilty plea in *United States* v. *Zudick*, 523 F.2d 848 (3d Cir. 1975), and *United States* v. *Moskow*, 588 F.2d 882 (3d Cir. 1978), and find the appeal to be properly before us now.

[2] The district court did not make any findings of fact or draw any conclusions of law when it denied Morrison's motion to dismiss the indictment. On appeal, we are not free to canvass the record and make our own findings of

counts of the indictment against Morrison should be dismissed with prejudice.

I.

3. On May 31, 1978, Salvatore Cucinotta, Morrison's lawyer, met with Assistant U.S. Attorney Jack Riley and D.E.A. agent Dennis Malloy for the purpose of engaging in pre-trial negotiations. At least from that date, the government knew that Mrs. Morrison was represented by counsel. Subsequently, agent Malloy was contacted by another D.E.A. agent, Stephen Hopson. Hopson was engaged in the investigation of a heroin dealer, and wished to gain Mrs. Morrison's cooperation in that investigation. Malloy was aware that Hopson wanted to negotiate with Mrs. Morrison, and knew that Hopson wished to "solicit her cooperation." Malloy discussed the case against Morrison "generally" with Hopson, and Hopson was allowed to examine the file on defendant's pending trial. Hopson also had "two or three" conversations with Assistant U.S. Attorney Riley in which Morrison's "name came up".

4. On August 23, 1978, D.E.A. agents Hopson and James Bradley visited defendant's home with neither

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fact. However, accepting all factual statements over which there is no dispute, adopting the pleadings submitted by the government, and taking at face value the testimony of the agents who were the government's witnesses, we still find that a pattern of impermissible conduct emerges. In any event it should be borne in mind that the dispute on appeal does not turn so much on how we characterize the conduct, as on whether we are justified in ordering the relief requested by the defendant.

the knowledge nor the permission of her counsel. At that time Hopson questioned Mrs. Morrison about the source of her heroin during the period prior to her arrest; suggested that she was facing a stiff jail term;[3] observed that he could make recommendations to the U.S. Attorney as to whether she should receive a lenient or heavy sentence; and told her about the government's protection plan for informers. Hopson also questioned Mrs. Morrison about how much money she was to pay Mr. Cucinotta. He then stated that he had seen her counsel's work, and suggested to Mrs. Morrison that she retain a public defender instead. He also urged her to obtain the services of a public defender if she wished to cooperate with the D.E.A. Finally, he suggested that she should think about the quality of the representation that she would receive for the amount of money ($200) that she was paying attorney Cucinotta. Upon departing, he gave defendant his telephone number.

5. Mrs. Morrison immediately called attorney Cucinotta, who went to her home. While he was there, Morrison called the number she had been given and made plans to meet agent Hopson between noon and 1:00 p.m. of the next day. However, that next day Hopson did not arrive as scheduled, but appeared without warning at about 6:00 p.m. The defendant told him that she had company and couldn't speak,

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[3] Mrs. Morrison testified that the agents warned her that the trial judge in her case was the "worst SOB in the federal courts", that he "hates black people", and that her "goddamn ass [was] going to jail". The agents testified that they did not recall the specifics of this conversation.

and that in any event she wanted her lawyer present. Hopson departed. One day lated Mrs. Morrison received yet another surprise visit from agent Hopson. According to Hopson's testimony he repeated the statements he had made during his first visit.

6. The government "readily concedes that the agents erred in attempting to elicit the cooperation of Morrison without working through her attorney." On these facts, we are confronted with neither the proverbial constable's blunder, nor overzealousness in the pursuit of otherwise legitimate law enforcement ends. Rather, we have a pattern of conduct calculated to intrude upon and destroy the attorney-client relationship.

II.

7. The government presents us with two threshold questions which must be answered before we may consider the advisability of granting such extraordinary relief as dismissal of the indictment. First, it contends that we are precluded by *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), from granting any relief at all. Second, it claims that, even if there has been a sixth amendment violation, dismissal of the indictment is not a permissible remedy.

8. The government reads *Weatherford* as holding that, in the absence of demonstrable prejudice, no sixth amendment violation occurs. We disagree. In *Weatherford*, the Supreme Court was asked to determine whether the presence of an undercover police officer at a strategy meeting between a defendant and his counsel amounted to a constitutional viola-

tion. The police officer, when in fact invited by the defendant, attended exclusively for the purpose of preserving his undercover identity and did not relate anything that he had heard during the course of the meeting. The Court of Appeals for the Fourth Circuit concluded that "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial." *Bursey* v. *Weatherford*, 528 F.2d 483, 486 (4th Cir. 1975). The Supreme Court reversed, reasoning that not every intrusion into the attorney-client relationship is a violation of the sixth amendment right to counsel, and rejected the Fourth Circuit's *per se* test. The Court's decision was a narrow one. The Court held only that "there being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the sixth amendment." 429 U.S. at 599. This holding is not broad enough to support the interpretation that the government urges upon us, namely that mere failure to gain evidence or tactical advantage from an intrusion bars any finding of a sixth amendment violation.

9. *Weatherford* applies, in the eavesdropping context, when there is *both* no prejudice to defendant's case *and* no wrongly motivated intrusion into the attorney-client relationship. This leaves untouched a vast range of conduct which does constitute a recognizable violation of the right to effective assistance

of counsel.[4] In the case of a deliberate attempt actually to sever or otherwise to interfere with the attorney-client relationship, a much more explicitly instrusive offense, the analysis must proceed differently. Here, it is appropriate to consider the purpose and propriety of the agent's conduct and its effect on the defendant's rights and the attorney-client relationship.[5] We had cause to consider this issue in *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972). There, prison officials were accused of wrongfully preventing an attorney from contacting his prisoner-client during the period immediately before trial. We advanced the test that, "if the interference was either wrongly motivated or without adequate justification, [it constitutes] an infringement of the constitutional right to counsel." *Id.* at 275.

10. This test for wrongfully motivated or inadequately justified interference is entirely consistent with the rationale of *Weatherford*, which itself identified purpose as a factor to be considered in the context of challenged eavesdropping. Indeed, since

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[4] Indeed, *Weatherford* is applied narrowly even in the eavesdropping context. In United States v. Levy, 577 F.2d 200 (3d Cir. 1978), we found that mere disclosure of attorney-client confidences constituted prejudice under the *Weatherford* test, without regard to whether there was any prejudicial effect on the outcome of the trial.

[5] This is exactly what was done in Gallarelli v. United States, 441 F.2d 1402, 1405 (3d Cir. 1971). There, we reversed a conviction based on a guilty plea negotiated in the absence of counsel. We held that "a plea entered without such guidance must be set aside without inquiry whether demonstrable harm resulted in the case in question."

in *Weatherford* the police officer intruded only to the extent that it was necessary to be physically present at defense meetings to preserve his cover, the intrusion was neither wrongly motivated nor without adequate justification, and would have been upheld under the *Via* test.[6] Accordingly, we conclude that *Weatherford* does not bar us from finding a violation on the facts before us.

11. The government next advances the contention that even if we find a sixth amendment violation, we are limited to ordering either suppression of evidence or a new trial. The government argues that since neither of these orders would be appropriate in this case, we are precluded from granting any relief at all. We readily agree that suppression or new trial are frequently appropriate forms of relief for sixth amendment violations. The government has cited a number of our previous decisions wherein such relief was ordered. However, none of those cases even suggests the novel rule that these two forms of relief are exclusive.[7] There is no principle advanced by the government which would limit our power to dismiss

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[6] As the Supreme Court noted in reference to the police officer's justification, "Our cases, however, have recognized the unfortunate necessity of undercover work." 429 U.S. at 557.

[7] Two examples demonstrate the inaptness of the government's authority to the proposition for which it has been cited.

In United States v. Cobbs, 481 F.2d 196 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973), we held that custodial interrogation in the absence of counsel was permissible if the defendant had freely and intelligently waived his right to have counsel present. Defendant had requested that the evidence gathered

the indictment should such a deterrent appear warranted.

12. In *Via* v. *Cliff*, we found that purposeful interference with the attorney-client relationship made out a colorable claim to relief under § 1983. There was no request for relief in the nature of dismissal of an indictment in that case. In *Gallarelli* v. *United States*, 441 F.2d 1402 (3d Cir. 1971), we found that the guidance of counsel during plea bargaining was so critical that a counsel-less bargain (i.e. one negotiated during a brief period when defendant was "between" attorneys) could not be accepted. There, we vacated the conviction that was based on the guilty plea. The question of whether dismissal was an appropriate remedy never arose. However, in *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978), we found it necessary to dismiss an indictment as the remedy for a sixth amendment violation. In that case a D.E.A. informer sat in on meetings between defendant and his counsel and disclosed the defense strategy to prosecution officers. Because an attempt

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from the interrogation be held inadmissible, but we had no need to reach that issue.

In United States v. Crook, 502 F.2d 1378 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975), we were confronted with a lower court's suppression of a confession made after a knowing waiver of defendant's *Miranda* rights, where the court found that the police officers knew that defendant was represented by counsel in an unrelated case. Our narrow holding was that the court could not suppress a confession made in full compliance with *Miranda*, because of what it found to be "unethical" police conduct. In the case before us today, we find an actual constitutional violation, and are free to provide an appropriate remedy. *Crook* is silent as to what the contours of that remedy should be.

to assess the prejudice to the defendant would have been speculative at best, we held that the intrusion and mere disclosure, without more, was sufficient to make out a sixth amendment violation. In light of the fact that no other relief would remedy the violation, and considering the extent and seriousness of the improper conduct of the government, we found the only appropriate relief for the violation to be dismissal of the indictment.

III.

13. The case before us fits this pattern. Under the test in *Via* and *Gallarelli*, the challenged conduct represents not only an "inadequately justified" but a thoroughly unjustified and wrongly motivated interference with the attorney-client relationship, and constitutes a violation of the defendant's sixth amendment right to effective assistance of counsel. As in *Levy* the conduct is not amenable to remedy through suppression or reversal of conviction.

14. What remains for decision is whether dismissal of the indictment is appropriate in the circumstances of this case. The government has conceded that the agents' actions were error, but urges that the admitted error was essentially harmless. The government apparently fails to appreciate the sixth amendment. As the Supreme Court has said, "Right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of damage arising from its denial." *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). In this case, the actual conduct, its motivation, its intended effect, and its pointed intrusive-

ness are readily apparent. Alone with the defendant, but with the knowledge that she was represented by counsel, the D.E.A. agents attacked the dedication and competence of her lawyer and attempted to raise doubts in her mind about his effectiveness. They represented themselves as having influence with the prosecution as a means of coercing defendant into abandoning her counsel and her defense.

15. The deliberate undermining of constitutional rights must not be countenanced. This is particularly so when, as here, the matter will come to the attention of the courts only when the importuning of the government agents is unsuccessful. There is, therefore, real danger that the courts themselves may become the unwitting instrumentality through which government agents may interfere with basic constitutional rights.

16. We have found a deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial. Accordingly, the judgment will be reversed, the sentence will be set aside, and the case will be remanded to the district court for the entry of an order dismissing both counts of the indictment with prejudice.

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TO THE CLERK:

Please file the foregoing opinion.

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JAMES HUNTER, III
*Circuit Judge*

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 78-2258

---

UNITED STATES OF AMERICA

*vs.*

MORRISON, HAZEL, APPELLANT

(D. C. Criminal No. 78-00193)

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HUNTER and WEIS, *Circuit Judges* and MARKEY, *Chief Judge* of the Court of Customs and Patent Appeals *

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennnsylvania and was argued by counsel on February 22, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the

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* Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, Washington, D.C., sitting by designation.

said District Court, filed October 11, 1978, be, and the same is hereby reversed, the sentence set aside and the cause remanded to the said District Court for entry of an order dismissing both counts of the indictment with prejudice, in accordance with the opinion of this Court.

ATTEST:

/s/ Thomas F. Quinn
Clerk

May 10, 1979

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 78-2258

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UNITED STATES OF AMERICA, APPELLEE

*v.*

MORRISON, HAZEL, APPELLANT

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SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. A separate opinion Sur Denial of Petition for Rehearing is being filed by Judge Garth, joined in by Judge Adams and Judge Rosenn.

BY THE COURT,

JAMES HUNTER, III
*Circuit Judge*

Dated: July 10, 1979

GARTH, *Circuit Judge*, dissenting from Order denying Petition for Rehearing:

I vote to grant the government's petition for rehearing *in banc*. In my view, the panel opinion, which will now become the law of this circuit, has reached an illogical result—a result which bears no relationship to the evil which the panel has properly condemned. In this case government agents sought to interfere with the relationship between a criminal defendant and her counsel. However, despite an acknowledged absence of prejudice to the defendant, the panel in finding a sixth amendment violation has ordered that the defendant's indictment be dismissed —a sanction without precedent in this or other circuits.

Inasmuch as under this circuit's operating procedures, only a court in banc may override a panel's published opinion (Internal Operating Procedures p. 25), I have voted for the court in banc to reconsider the panel's decision in this case—a decision which I believe to be seriously flawed, in both analysis and result.

I

Hazel Morrison, the defendant-appellant, was indicted on June 28, 1978 on two counts of illegally distributing heroin in violation of 21 U.S.C. § 841 (a)(1). On May 31, 1978, Salvatore Cucinotta, Morrison's attorney, met with an Assistant United States Attorney and with Dennis Malloy, an agent of the Drug Enforcement Agency (D.E.A.), for purposes of engaging in pretrial negotiations. Therefore,

at least from May 31, 1978 on, the government knew that Morrison was represented by counsel. On August 23, 1978, D.E.A. agents Stephen Hopson and James Bradley visited Morrison's home without the knowledge or permission of her counsel.[1] According to the panel opinion, Slip Op. at 3,

> Hopson questioned Mrs. Morrison about the source of her heroin during the period prior to her arrest; suggested that she was facing a stiff jail term;[3] observed that he could make recommendations to the U.S. Attorney as to whether she should receive a lenient or heavy sentence; and told her about the government's protection plan for informers. Hopson also questioned Mrs. Morrison about how much money she was to pay Mr. Cucinotta. He then stated that he had seen her counsel's work, and suggested to Mrs. Morrison that she retain a public defender instead. He also urged her to obtain the services of a public defender if she wished to cooperate with the D.E.A. Finally, he suggested that she should think about the quality of the representation that she would receive for the amount of money ($200) that she was paying attorney Cucinotta. Upon departing, he gave defendant his telephone number.

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[3] Mrs. Morrison testified that the agents warned her that the trial judge in her case was the "worst SOB in the federal courts", that he "hates black people", and that her "goddamn ass [was] going to jail". The agents testified that they did not recall the specifics of this conversation.

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[1] Prior to this visit, Hopson had spoken with Malloy concerning Morrison. Hopson was investigating a heroin dealer, and wished to gain Morrison's coperation in that investiga-

Undaunted by this encounter, Morrison immediately called her attorney, who came to her home. In Cucinotta's presence, Morrison called the telephone number given her by Hopson. Apparently in an attempt to verify the misconduct of the D.E.A. agents, she made plans to meet Hopson between noon and 1:00 p.m. of the next day. Hopson did not arrive at the scheduled time, however, but came instead at 6:00 p.m. He departed upon being informed by Morrison that she had company and could not speak, and that in any event she wanted her attorney present. The next day, August 25, 1978, Morrison received another visit from Hopson. According to Hopson's testimony he repeated the statements he had made during his first visit.

Prior to trial, Morrison filed a Motion to Dismiss the Indictment with Prejudice, alleging denial of her sixth and fourteenth amendment right to effective assistance of counsel and her fourteenth amendment right to a fair trial. This motion was denied without opinion by the district court. Immediately thereafter, appearing with her same attorney Salvatore Cucinotta, Morrison entered a conditional plea of guilty to one count of distribution. She was sentenced to five years imprisonment, followed by a special parole term of three years. On appeal, a panel of this court reversed the judgment of sentence and remanded to the district court with an order to dismiss the indict-

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tion. Malloy discussed Morrison's case with Hopson, and Hopson had certain discussions with an Assistant United States Attorney in which Morrison's name was mentioned.

ment with prejudice because the government had interfered with Morrison's sixth amendment right to counsel!

II

There can be no excuse made for the improper conduct of the D.E.A. agents in this case. Nonetheless, I most strenuously disagree with the analysis and the result of the panel opinion. The logic of the panel opinion will simply not bear scrutiny. Apparently because the panel cannot think of an appropriate sanction to correlate with the non-prejudicial, albeit inexcusable, conduct of the government in this case, it has decided to impose the extreme sanction of dismissing the indictment. The infirmity in the reasoning of the panel opinion is compounded by the result. Dismissal of the indictment despite the absence of any prejudice to the defendant from the misconduct of the government is completely unjustified.

A

The Supreme Court, in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), held that not all invasions of the attorney-client relationship by government agents would give rise to a sixth amendment violation. In that case, Bursey, the criminal defendant, sued Weatherford, a government informant, under 42 U.S.C. § 1983, alleging, *inter alia*, that Weatherford had violated Bursey's sixth amendment rights by attending two meetings with Bursey and his attorney. Rejecting the argument that such an intrusion was a per se violation of the sixth amendment, the

court reasoned that "[t]here being no tainted evidence in this case, no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford, there was no violation of the Sixth Amendment . . . ." 429 U.S. at 558.[2]

The test formulated in *Weatherford* v. *Bursey*, *supra*, was applied by this court in *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1977). *Levy* involved a direct appeal from a judgment of sentence in which the defendant, Levy, attacked his conviction on the ground that a government informant, posing as a co-defendant, had violated the privileged relationship between Levy and his attorney and had disclosed confidential defense strategy to government personnel.

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[2] In Via v. Cliff, 470 F.2d 271 (3d Cir. 1972), this court held that a prisoner could maintain an action *for damages* under § 1983 against prison officials for interference with the prisoner's right to counsel while he was confined in county prison awaiting trial. The court stated that if the prisoner "can prove that the interference was either wrongfully motivated or without adequate justification and involved the defendant(s), he will have established an infringement of his constitutional right to counsel by the defendant(s)." 470 F.2d at 275. Although the court stated that the prisoner "can maintain this cause of action without alleging or proving prejudice to his defense at trial by the alleged actual infringements," *id.*, it was apparent from the facts that the prison officials had engaged in the sort of purposeful conduct that the Supreme Court suggested in Weatherford v. Bursey, *supra*, would constitute a sixth amendment violation. The court in Via v. Cliff expressed no view as to the damages the prisoner might recover. *Id.* at 275 n.3. Thus, even if Morrison has established a sixth amendment violation within the standards set forth in Via v. Cliff, that opinion cannot be relied upon to support the dismissal of the indictment in this case.

As this court held, prejudice to the defendant would be presumed in such a case:

> Where there is a knowing invasion of the attorney-client relationship and where confidential information is disclosed to the government, we think that there are overwhelming considerations militating against a standard which tests the sixth amendment violation by weighing how prejudicial to the defense the disclosure is.
>
> . . .
>
> We think that the inquiry into prejudice must stop at the point where attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case.

577 F.2d at 208-09.

This holding is fully consistent with *Weatherford* v. *Bursey, supra,* which indicates that the sixth amendment will be violated whenever there is "communication of defense strategy to the prosecution . . . ." 429 U.S. at 558.

Concluding that a sixth amendment violation occurred, the *Levy* court determined that dismissal of the indictment was the only appropriate remedy because the information revealed by the government informant had become part of the public domain. 577 F.2d at 210. No contrived safeguards could assure that the information would not be made use of by the government if a new trial were ordered. *Id.*

Although it is a close question, I will assume that the conduct of the D.E.A. agents was sufficiently

"purposeful" in this case to give rise to a sixth amendment violation under the standards established in *Weatherford* v. *Bursey, supra.* But concluding that a constitutional violation occurred should in no way lead to the panel's holding that the indictment must be dismissed. As the *Levy* opinion indicates, dismissal of the indictment is appropriate when the harm to the defendant cannot effectively be cured by less drastic means. This case, by contrast, does not present a situation where prejudice to the defendant cannot be remedied in alternate ways. Indeed, this case presents a situation where there has been *no showing* whatsoever that the defendant has been prejudiced by the government's misconduct. There is no claim that confidential attorney-client communications were revealed to the government as a result of the conduct of the D.E.A. agents. Nor is there any claim that Morrison's confidence in her attorney was undermined by governmental conduct, or that her guilty plea was induced by it.

Inexplicably, the panel opinion turns the rationale of *Levy* on its head; it reasons that because the defendant was not prejudiced, dismissal of the indictment is the only available remedy.[3] This analysis is fundamentally flawed. As the Government's Petition for Rehearing In Banc acutely points out, ". . . the panel's analysis reduces to the following *non*

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[3] The panel's reliance on Glasser v. United States, 315 U.S. 60 (1942), is misplaced. In *Glasser*, the court ordered a new trial because of a violation of the defendant's sixth amendment rights. The indictment was not dismissed.

*sequitur*: Since the [D.E.A.] agents' conduct was reprehensible, the defendant must be granted some relief; and since there was no disclosure to suppress or trial to re-try, dismissal is proper." In addition, the panel opinion works a significant harm to the public interest because it immunizes criminal defendants from prosecution even though government misconduct has caused them no harm.[4]

Indeed, as a result of the panel's decision, a defendant finding himself in this situation may be better off by alleging no prejudice than by claiming he was harmed by the government's misconduct. In the latter case, he may be granted a new trial or if he has pled guilty, his plea may be vacated. But if he succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed.

B

Even if the reasoning of the panel opinion were sound, which I do not believe it is, the result requiring dismissal of the indictment is utterly inappropriate in this case. I agree with the analysis of Judge

---

[4] It is not necessarily the case that the government misconduct must go entirely unremedied in this case. The D.E.A. agents may be subject to departmental disciplinary measures. Moreover, they may be subject to suit in a civil action by Morrison under the rationale of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Of course, such a civil remedy would not preclude suppression in a criminal trial of any information gleaned by the government's violation of a defendant's sixth amendment rights. It is for these reasons as well that I disagree with the rationale of the panel opinion.

Feinberg in *United States* v. *Broward*, 594 F.2d 345 (2d Cir. 1979), *cert. denied*, 47 U.S.L.W. 3811 (U.S. June 19, 1979), as to when dismissal of an indictment is an appropriate remedy. In that case, the district court had determined that government officials inserted false materials into an arrest warrant and had lied in court. Consequently, the district court dismissed the indictment. The court of appeals reversed, ruling that "dismissal of the indictment was an inappropriate response." 594 F.2d at 351. Judge Feinberg reasoned as follows:

> In United States v. Fields, 592 F.2d 638 (2d Cir. 1978), [*cert. denied*, 47 U.S.L.W. 3786 (U.S. June 4, 1979),] Judge Timbers pointed out for this court that we have upheld the dismissal of an indictment only in very limited and extreme circumstances. In such cases, there was a need either to eliminate prejudice to a defendant in a criminal prosecution, where it was impossible to do so by imposition of lesser sanctions, or to deter a pattern of demonstrated and long-standing widespread or continuous official misconduct.
>
> . . .
>
> While these may not be the only conceivable circumstances in which we would uphold a dismissal, . . . we emphasize here, as was emphasized in Fields, that the sanction is so drastic that, especially where serious criminal conduct is involved, it must be reserved for the truly extreme cases.

594 F.2d at 351. *See United States* v. *Owens*, 580 F.2d 365 (9th Cir. 1978).

Under the standards set forth in *Broward*, dismissal of the indictment is an obviously improper remedy in this case. There has been no claim made, nor could there be, that Morrison was prejudiced by the government's misconduct, or that this type of misconduct is widespread, routine, constant or continuous. Neither remedial nor deterrence rationales support the extraordinary sanction imposed by the panel. As a consequence, the public is punished for the misconduct of a government agent even though that misconduct did no harm to the defendant.

III

This is a case in which, conceding the alleged misconduct of the government, the defendant did not sever her relationship with her attorney; the government learned nothing from its interview with her; and her attorney, whom she still retained, did no more than assist her in entering her plea of guilty. Thus, there exists simply no relationship between the sanction imposed and the injury which it redresses.

The government's petition for rehearing which followed the filing of the panel opinion reinforces my view that this case deserves in banc consideration. I therefore vote to grant the petition and I dissent from the court's order which denies it.

Judge Rosenn joins in this dissent.

Judge Adams also votes for rehearing *in banc*, because he believes that in view of the position of the

Second Circuit in *Broward* the issue in this case is sufficiently important to warrant the attention of the full Court. This would seem particularly so, he observes, since the *Broward* case was not brought to the attention of the panel before its opinion was filed.

Dated: July 10, 1979

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 299982 63

Supreme Court, U.S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

NO. 79-395

---

UNITED STATES OF AMERICA, Petitioner

v.

HAZEL MORRISON, Respondent

---

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

---

The respondent, Hazel Morrison, asks leave to file the attached Reply to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit without repayment of costs and to proceed in forma pauperis pursuant to Rule 53.

Copies of the respondent's Affidavit as filed with the Third Circuit and Appointment Order dated October 30, 1979 under the Criminal Justice Act are attached hereto.

SALVATORE J. CUCINOTTA, ESQUIRE
Counsel for Respondent
1314 Chestnut Street, 12th Floor
Philadelphia, PA 19107

# FINANCIAL AFFIDAVIT

CJA 23

IN SUPPORT OF REQUEST FOR ATTORNEY, EXPERT OR OTHER SERVICES WITHOUT PAYMENT OF FEE

IN UNITED STATES IN THE CASE OF: U. S. A. vs. MORRISON, HAZEL

[ ] MAGISTRATE [ ] DISTRICT [XX] APPEALS COURT [ ] OTHER PANEL (Specify below)

FOR: the THird Circuit

AT: Philadelphia, Pennsylvania

LOCATION NUMBER: 38001

PERSON REPRESENTED (Show your full name): HAZEL MORRISON

HOME ADDRESS: c/o Mr. Moses McDuffie
5243 Pine Street, Philadelphia, Pa. 19143

CHARGE/OFFENSE (describe if applicable & check box ▪): [XX] Felony [ ] Misdemeanor
Distribution - Title 21 U.S.C. § 841(a)(1)
Aiding and abetting - Title 18 U.S.C. § 2

[ ] 1 Defendant - Adult
[ ] 2 Defendant - Juvenile
[XX] 3 Appellant
[ ] 4 Probation Violator
[ ] 5 Parole Violator
[ ] 6 Habeas Petitioner
[ ] 7 2255 Petitioner
[ ] 8 Material Witness
[ ] 9 Other (Specify)

DOCKET NUMBERS
Magistrate:
District Court: 78-00193
Court of Appeals: 78-2258

## ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

**ASSETS**

**EMPLOYMENT**

Are you now employed? [ ] Yes [X] No [ ] Am Self Employed

Name and address of employer:

IF YES, how much do you earn per month? $

IF NO, give month and year of last employment
How much did you earn per month $

If married is your Spouse employed? [ ] Yes [X] No

IF YES, how much does your Spouse earn per month $

If a minor under age 21, what is your Parents or Guardian's approximate monthly income $

**OTHER INCOME**

Have you received within the past 12 months any income from business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? Yes [ ] No [X]

IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES

RECEIVED $ | SOURCES

**CASH**

Have you any cash on hand or money in savings or checking accounts? Yes [ ] No [X] IF YES, state total amount $

**PROPERTY**

Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Yes [ ] No [X]

IF YES, GIVE VALUE AND DESCRIBE IT

VALUE $ | DESCRIPTION: (1973) 3500 sq ft ranch house

**OBLIGATIONS & DEBTS**

**DEPENDENTS**

MARITAL STATUS — Total No. of Dependents: 6

[ ] SINGLE
[ ] MARRIED
[X] WIDOWED, SEPARATED OR DIVORCED

List persons you support and your relationship to them:
Linda Morrison, wife Morrison
Morrison, Stepdaughter
Morrison

**DEBTS & MONTHLY BILLS**

(LIST ALL CREDITORS, INCLUDING BANKS, LOAN CO., CHARGE ACCOUNTS, ETC.)

| APARTMENT OR HOME | Creditors | Total Amt. | Monthly Pymt. |
|---|---|---|---|
| | | $ | $ |
| | | $ | $ |
| | | $ | $ |
| | | $ | $ |

BORN TO AND DESCRIBED JUNE 196 HIS 26TH DAY F OCT. 197

I certify the above to be correct.

SIGNATURE OF DEFENDANT OR PERSON REPRESENTED: Hazel Morrison

DATE:

ELAINE GIOVANETTI
Notary Public, Phila., Phila. Co.
My Commission Expires June 28, 1982

**WARNING:** A FALSE OR DISHONEST ANSWER TO A QUESTION IN THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH

# APPOINTMENT AND AUTHORITY TO PAY COURT APPOINTED COUNSEL

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT XX APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: U.S.A. vs. MORRISON, HAZEL

FOR: the third Circuit

AT: Philadelphia, Pennsylvania

LOCATION NUMBER: 38001

PROCEEDING (describe briefly): Petition for Writ of Certiorari

CHARGE/OFFENSE (describe if applicable & check box →): Distribution and Aiding and Abetting — XX Felony ☐ Misdemeanor

U.S. or other code citation: Title 21 U.S.C. § 841(a)(1) ~~Title 18 U.S.C. § 2~~

1 ☐ Defendant – Adult
2 ☐ Defendant – Juvenile
3 XX Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☐ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate:
District Court: 78-00193
Court of Appeals: 78-2258

VOUCHER NUMBER: 546061

PERSON REPRESENTED (Show full name & status, & check box →): MORRISON, HAZEL, Appellant

Name already appears as ☐ PI or as XX Of above

## COURT ORDER

XX APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR:
(name of prior counsel) (date appt'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Salvatore J. Cucinotta, Esquire

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or Magistrate

October 30, 1979
Date

OR BY ORDER OF THE COURT

(Clerk or Deputy)

## CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ Yes ☐ No

If "Yes", how much were you paid? $

By whom were you paid?

If this is an appeal did you represent person in lower court? ☐ Yes ☐ No

## FOR SERVICES & EXPENSES VOUCHERED BELOW

| * | TIME SPENT | DATES | HOURS | AMOUNT |
|---|---|---|---|---|
| I | IN OPEN COURT | | | |
| | A. ARRAIGNMENT &/OR PLEA | | | |
| | B. MOTIONS & REQUESTS | | | |
| | C. BAIL HEARINGS | | | |
| | D. SENTENCE HEARINGS | | | |
| | E. TRIAL | | | |
| | F. REVOCATION HEARINGS | | | |
| | G. APPEALS COURT | | | |
| | H. OTHER (Specify below) | | | |
| | TOTAL "IN COURT" HOURS | | | $ |
| II | OUT OF COURT | | | |
| | A. INTERVIEWS & CONFERENCES | | | |
| | B. OBTAINING & REVIEWING RECORDS | | | |
| | C. LEGAL RESEARCH & BRIEF WRITING | | | |
| | D. INVESTIGATIVE & OTHER WORK (Specify) | | | |
| | E. TRAVEL TIME (during normal office hours only): (1) TO & FROM COURT (round trips under 1 hr not allowed) (2) OTHER TRAVEL TIME (Specify) | | | |
| | TOTAL "OUT OF COURT" HOURS | | | $ |
| | TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME | | | $ |

RATE PER HR $ — HOURS TIMES RATE

III. ITEMIZED EXPENSES (Specify, per instruction sheet) — AMT. PER ITEM $

TOTAL ITEMIZED EXPENSES $

TOTAL COMPENSATION & EXPENSES $

*If more space is needed use additional blank sheets

DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE

NET AMOUNT CLAIMED $

SIGNATURE OF ATTORNEY/PAYEE — I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

AMOUNT CERTIFIED/APPROVED $

APPROVED FOR PAYMENT

SIGNATURE OF JUDGE/MAGISTRATE — DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — DATE

Payment in excess of statutory limitation approved under 18 USC 3006A(d) (3) — AMT. APPROVED $

MORRISON, HAZEL, Appellant

Name already appears as ☐ PI or as XX Def above

☐ 1) Material Witness
☐ 2) Other (Specify Below)

VOUCHER NUMBER
546061

**COURT ORDER**

XX APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR:
(name of prior counsel) (date app'd.)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

Salvatore J. Cucinotta, Esquire

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or Magistrate

October 30, 1979
Date

OR BY ORDER OF THE COURT

(Clerk of the court)

**FOR SERVICES & EXPENSES VOUCHERED BELOW**

| * TIME SPENT | DATES | HOURS | AMOUNT |
|---|---|---|---|
| I IN OPEN COURT | | | |
| A. ARRAIGNMENT &/OR PLEA | | | RATE PER HR $ — HOURS TIMES RATE |
| B. MOTIONS & REQUESTS | | | |
| C. BAIL HEARINGS | | | |
| D. SENTENCE HEARINGS | | | |
| E. TRIAL | | | |
| F. REVOCATION HEARINGS | | | |
| G. APPEALS COURT | | | |
| H. OTHER (Specify below) | | | |
| TOTAL "IN COURT" HOURS | | | $ |
| II OUT OF COURT | | | |
| A. INTERVIEWS & CONFERENCES | | | $ |
| B. OBTAINING & REVIEWING RECORDS | | | |
| C. LEGAL RESEARCH & BRIEF WRITING | | | |
| D. INVESTIGATIVE & OTHER WORK (Specify) | | | |
| E. TRAVEL TIME (during normal office hours only): (1) TO & FROM COURT (round-trips under 1 hr not allowed) (2) OTHER TRAVEL TIME (Specify) | | | |
| TOTAL "OUT OF COURT" HOURS | | | $ |
| TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME | | | $ |

III. ITEMIZED EXPENSES (Specify, per instruction sheet) — AMT. PER ITEM $

TOTAL ITEMIZED EXPENSES $

TOTAL COMPENSATION & EXPENSES $

*If more space is needed use additional blank sheets

DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE

NET AMOUNT CLAIMED $

**CERTIFICATIONS OF ATTORNEY/PAYEE**

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ Yes ☐ No

If "Yes", how much were you paid? $

By whom were you paid?

If this is an appeal did you represent person in lower court? ☐ Yes ☐ No

SIGNATURE OF ATTORNEY/PAYEE — I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

AMOUNT CERTIFIED/APPROVED

APPROVED FOR PAYMENT

SIGNATURE OF JUDGE/MAGISTRATE — DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — DATE

Payment in excess of statutory limitation approved under 18 USC 3006A(d) (3) AMT. APPROVED $

COUNSEL
XX IS A PRIVATE ATTORNEY
IS FURNISHED BY:
☐ COMMUNITY DEFENDER ORGANIZATION
☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. 215 - 732 - 3311
215 - 732 - 2323

VOUCHER NUMBER 546061

SOCIAL SECURITY NO. 170-36-5823

ATTORNEY
ORGANIZATION
Salvatore J. Cucinotta, Esquire

ADDRESS
12th Floor, 1314 Chestnut Street
Philadelphia, Pennsylvania

ZIP CODE 19107

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED

COPY 1-MAIL TO ADMINISTRATIVE OFFICE AFTER SERVICE RENDERED

Supreme Court, U.S.
FILED
JAN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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NO. 79-395

---

UNITED STATES OF AMERICA, Petitioner

v.

HAZEL MORRISON, Respondent

---

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

# RESPONDENT'S REPLY IN OPPOSITION

---

SALVATORE J. CUCINOTTA, ESQUIRE
Counsel for Respondent

12th Floor, 1314 Chestnut Street
Philadelphia, PA 19107

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

NO. 79-395

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UNITED STATES OF AMERICA, Petitioner

v.

HAZEL MORRISON, Respondent

---

RESPONDENT'S REPLY TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

Counsel for the respondent respectfully urges this Most Honorable Supreme Court that the Petition For A Writ of Certiorari be denied.

## I. OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 602 F.2d 529.

## II. JURISDICTION

On December 13, 1979, the Clerk of the Supreme Court of the United States extended the time within which to file a response to the Petition For A Writ of Certiorari to and including January 16, 1980. There is no dispute that this Court has jurisdiction. 28 U.S.C. §1254(1).

## III. COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether review is necessary when charges are dismissed to protect the adversary system where the Government attempts to

disparage the competence of defense counsel in favor of another attorney more sympathetic to the Government's interests on the eve of trial?

## IV. COUNTER-STATEMENT OF THE CASE*

Respondent, Hazel Morrison, was arrested on May 17, 1978 and charged with illegally distributing heroin on April 12, 1977 and May 10, 1977. Before her trial she filed a Motion to Dismiss the Indictment with Prejudice based on a denial of her Sixth Amendment right to counsel which was heard on September 5 and 6, 1978 and denied. The motion concerned the nature of two direct counselless interviews conducted by Drug Enforcement Agency (D.E.A.) agents occurring over the course of three days. At the end of the hearing on the motion, the respondent entered an open conditional guilty plea to one count of distribution, contingent on appealing the denial of her aforesaid motion to the Third Circuit Court of Appeals.

On October 10, 1978, she was sentenced to five years imprisonment with a special parole term of three years to follow. The respondent appealed to the Third Circuit Court resulting in the dismissal of the charges. The Government now brings the instant Petition For Certiorari from the dismissal. The respondent's counter-statement of facts is as follows.

For the purpose of pre-trial negotiations and discovery, defense counsel Salvatore J. Cucinotta, Esquire met with Assistant United States

---

*There can be no dispute as to the facts in the case. The following is merely a more detailed statement than presented in the Government's Petition.

Attorney John E. Riley and D.E.A. agent Dennis Malloy on May 31, 1978 (Tr. 106/App. 121a).[1]

After May 31, 1978 another D.E.A. agent, Stephen Hopson, contacted agent Malloy for the purpose of interviewing Ms. Morrison and returning the personal property found in respondent's automobile (Tr. 107/App. 122a), without advising the Assistant United States Attorney or defense counsel. Agent Malloy knew that Hopson wanted "to solicit her [the accused's] cooperation in his particular investigation," and that Hopson would "negotiate" directly with the accused (Id.). To assist in his negotiations, agent Hopson discussed the pending charges "generally" with Malloy (Tr. 109/App. 124a). He examined Malloy's file (Tr. 20/App. 36a), which directly related to her impending September 5, 1978 trial and determined who the trial judge would be (Tr. 109/App. 124a). Agent Hopson also spoke to Assistant United States Attorney John E. Riley, the Government's trial counsel, before speaking, negotiating and interrogating the responding at her home (Tr. 21/App. 37a). Hopson did not inform Riley of his plan to contact Ms. Morrison.

By August 11, 1978, Assistant United States Attorney G. Daniel McCarthy replaced Riley as the Government's trial counsel. On Wednesday, August 23, 1978, D.E.A. agents Hopson and Bradley, without the knowledge or consent of defense counsel or the United States

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[1] All page citations refer to notes of testimony in the transcript (Tr.) in the lower court, and/or the Appellant's Appendix (App.) filed in the Third Circuit.

Attorney's office, went to the home of the respondent. (Government's Memorandum of Law in Support of its Answer to Defendant's Motion to Dismiss the Indictment with Prejudice, p.2/App. 3a). Greeted by the respondent's children, the agents obtained entry into the respondent's home (Tr. 150/App. 164a). They were not invited in (Tr. 130/App. 145a). When respondent came downstairs from her bedroom, the agents asked her whether they could sit down with her in the dining room. (Id.)

Agent Hopson told respondent that he wanted to discuss the pending charges against her (Tr. 112, 132/App. 127a, 146a) and how he could help her with regard to her case. Finding Ms. Morrison reticent to their overtures, the agents altered their tactic, choosing to subvert her confidence in her lawyer. Hopson stated: "Your lawyer is going to make a asshole out of hisself and you, too, in the courtroom . . . . [i]f you decide to fight your case . . . [sic]." (Tr. 112/App. 127a, see also Tr. 152, 156, 161/App. 166a, 170a, 175a). She then was questioned as to the source of her heroin in April and May of 1977 (Tr. 134/App. 148a), but again, to no avail.

Resisting these inquiries, the agent reminded her that she was going to trial before the worst "son of a bitch" trial judge in the federal system (Tr. 113/App. 128a). This intimidation also failed. Returning to their attempt to subvert her confidence in her counsel, she was told that the only thing her attorney was interested in was his fee (Tr. 113/App. 128a, Tr. 152/App. 166a, Tr. 153/App. 167a) and not whether she would win her case (Tr. 162/App. 176a).

The agents, trying another tactic, promised repondent a job and another place to live if she cooperated (Tr. 161/App. 175a). She resisted. To undermine her resistance, the Agents played upon Ms. Morrison's emotional and maternal ties to her children, asking her to consider the fate of her children if she failed to cooperate and was incarcerated (Tr. 162/App. 176a, G-2/App. 15a, G-3 cassette tape). Hopson then handed her a piece of paper with his phone number if she decided to change her mind and save herself (Tr. 114/App. 129a).

Concerned, upset and shaken by this surreptitious visit, Ms. Morrison immediately called her attorney who went to the respondent's residence post haste. In the presence of counsel and his investigator, respondent called Agent Hopson and tape recorded her side of the conversation,[2] stating:

> I'm calling you back because I was thinking about what you was talking about. I want to know, what do I really have to do, since my lawyer can't help me? I mean what I'm trying to find out is, the person that you named, that's the only thing that you want me to do? Between 12:00 and 1:00 o'clock, you'll be . . . all right. Think it over, I did, well I thought it over when you left, when you got to talking about my kids. Between 12:00 and 1:00.

Plans were made to meet with the agents again between 12:00 and 1:00 P.M. on the next day because Ms. Morrison wanted her

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[2] Although the Government utilized taped phone conversations of Ms. Morrison to prove the criminal charges, she could not tape the conversation of the D.E.A. agents to memorialize their activities without violating the Commonwealth of Pennsylvania's wiretapping law. 18 Pa. Cons. Stat. Ann. §5702 et seq.

investigator "to be at my house to hear some of the things that Steve Hopson was saying to me because I felt like my word wouldn't go far in a courtroom against an agent, a Government agent." (Tr. 127/App. 142a).

On Thursday, August 24, 1978, agents Hopson and Bradley unexpectedly arrived between 5:00 and 6:00 P.M. (Tr. 125/App. 140a). They were greeted by the respondent's son, Otis Morrison, Jr. Hopson stuck his foot in the door and tried to push it open before the respondent could arrive at the door (Tr. 155/App. 169a). When she came to the door, she told the agents that she had company and could not speak to them at the time. She also told them that she wanted her attorney present (Tr. 144/App. 158a). They left.

On Friday, August 25, 1978, the respondent again was unexpectedly visited for a third time. After learning that her counsel was in Pittsburgh (Tr. 14/App. 30a) the Agents told her that if she did not cooperate fully with them they would "bust" her "ass" (Tr. 128/App. 143a). They also stated that defense counsel could do nothing for her unless the respondent agreed to cooperate with the Agents (Id.). Continuing the intimidation, she was reminded that it would be her "goddamn ass that is going to jail" because her trial judge "hated black people" (Tr. 129/App. 144a). Failing to convince her to change her defense counsel and cooperate with the Government, the Agents became "perturbed" and "angry" (Tr. 102-3/App. 117-8a). She was finally told that she could not wait until the last minute to cooperate and that if she did, agent Hopson would "fango" her counsel (sic, phonetic) (Tr. 130/App. 145a). Respondent

resisted these intimidations and threats.

On August 30, 1978 the respondent filed a Motion to Dismiss the Indictment with Prejudice requesting a dismissal of the charges against her on the grounds the aforedescribed conduct of the D.E.A. agents constituted an interference with her Sixth Amendment right to counsel and a denial of due process. The Government's answer to said motion admitted that the agents had made contact with the respondent but that they did not seek to learn where the respondent's heroin supply came from in April or May of 1977, but rather they sought information regarding her source "from the early 1970's to 1976." (Answer to Defendant's Motion to Dismiss the Indictment With Prejudice, paragraph 7, App. 6a). The Government's answer also indicated that the "agents specifically advised the defendant that they did not want to talk about her outstanding case." (Id.). The Government's Memorandum further admitted that "without advising defense counsel, the Government during the aforesaid week (August 23, 1978) attempted to induce the defendant to become an informant and to cooperate with the Federal Agents in their on-going investigation of traffic in narcotics." (paragraph 8 of Answer/App. 7a). The Government denied, however, that the effectiveness of defendant's trial counsel was ever discussed between the agents and the respondent. (paragraph 9 of Answer/App. 7a). The Government also conceded that the agents erred "in attempting to elicit the cooperation of Morrison without working through her attorney" as was done initially in May of 1978 (p. 2-Government's Memorandum of Law in Support of its Answer to Defendant's Motion to Dismiss the Indictment with Prejudice/App. 3a).

On August 31, 1978, respondent entered into an agreement with the Government whereby she would waive all her pre-trial motions, jury selection and trial rights and enter a plea to one count of the indictment as long as she could have a hearing on her Motion to Dismiss which could be appealed to the Third Circuit Court of Appeals if denied by the trial judge.[3]

On September 5, 1978, defense counsel and respondent appeared in court ready for a hearing on the Motion. Based upon the Government's answer to the motion, Government testimony was expected to show that no discussions were held between the agents and the defendant relevant to (a) her trial, or (b) the competency of her trial counsel. (See Answer to Defendant's Motion to Dismiss the Indictment with Prejudice at paragraph 7, and pages 1 and 2 of Government's Memorandum of Law in Support of its Answer to Defendant's Motion to Dismiss the Indictment with Prejudice at App. pp. 6a to 7a and pp. 8a to 9a, respectively). When defense counsel appeared in court, he brought a cassette tape recorder and several tapes, two of which were labeled "HOPKINS [sic] - PHONE" and "HOPKINS [sic] - AUG. 25." The tapes were conspicuously placed on his counsel table along with his defense file, folders and notes. Defense counsel expected to utilize a third tape containing the one-sided phone call of Ms. Morrison and transcription of same during the hearing on the motion (G-2 App. 15a and G-3, a cassette tape). Noticing the labeled tapes and the recorder, the Government's

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[3] Use of the conditional guilty plea was condoned in United States v. Zudick, 523 F.2d 848 (3rd Cir. 1975).

first witness, D.E.A. agent Hopson, advised the Assistant United States Attorney G. Daniel McCarthy that "he believed that the tape recordings resulted from illegal wiretapping and eavesdropping." (See Affidavit of Probable Cause for Warrant #36688 at App. 13a-14a).

When agent Hopson took the stand, he had difficulty recalling what transpired between him and the respondent at her home. He was generally unsure, if he was not "mistaken" in his recollection (Tr. 19/App. 35a). For example, in the first twenty-one pages of his testimony he could not recall or equivocated in his answers to over ten questions. Agent Hopson took the stand and testified, inter alia:

Q. [By Mr. McCarthy] Did you ask her anything about her case?

A. Definitely not. (Tr. 10/App. 26a).

* * *

Q. Did you say anything about that case?

A. Not that I recall.

* * *

Q. Did she discuss with you anything about her case?

A. No sir. (Tr. 12/App. 28a).

* * *

Q. In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?

A. Not that I recall. (Tr. 14/App. 30a).

* * *

But later, the Agent would "recall" and contradict his previous testimony:

Q. Did you at any time during these three contacts with Mrs. Morrison discuss with her anything about this case?

A. No sir, not specifically. (Tr. 15/App. 31a) (Emp. Sup.).

The agent admitted that he was attempting to acquire an "off-the-record offer" of what she could do (Tr. 16/App. 32a) without the knowledge of her attorney.

Q. In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?

MR. CUCINOTTA: Objection.

THE COURT: Overruled.

THE WITNESS: Not that I recall (Id.).

During cross-examination Hopson testified that the original Assistant United States Attorney assigned, Mr. Riley, "may have" spoken to him on several occasions regarding Hazel Morrison (Tr. 18/App. 34a), but that he could not "recall exactly" (Id.). He said he did not need any additional information to assist his investigation from Agent Dennis Malloy; that he was aware of the charges against her before going to see her (Tr. 23/App. 39a); and that he wanted to "help her" with respect to those charges (Tr. 25/App. 41a). He explained that he could help her get "probation" because of the likelihood of her going to jail (Tr. 27/App. 43a).

Hopson's testimony then recalled that later on the same day he received a phone call from the respondent which he remembered only in general terms (Tr. 30/App. 46a). Defense counsel then handed the Assistant United States Attorney a transcript of the accused's conversation, later marked G-2 (App. 15a), to be used in an effort to refresh the memory of the agent. At side bar, the Assistant United States Attorney objected and asked that all tapes and the recorder on defense counsel's desk be seized and confiscated for Commonwealth prosecution under the local wiretap law (Tr. 30/App. 46a). Defense counsel advised the Court that use of the transcript, G-2, would be to "refresh the memory of the Agent" (Tr. 31/App. 47a). He also represented to the Court that the transcript was not a violation of the law. Defense counsel then saw the agent "overhearing the conversation" with the Judge at side bar (Tr. 31/App. 47a) (Id.). Although the trial court stated the witness could not hear the conversation (Id.), a subsequent search warrant for defense counsel's files, briefcase (Tr. 61/App. 77a), tapes and tape recording device indicated that the agent was eavesdropping on the side bar colloque. (Search Warrant, Affidavit p. 1/App. 13a).

Defense counsel renewed his argument for permission to use G-2 to refresh the agent's memory, stating to the court:

> Part of the evidence [against the accused] is tape recordings which were consentually utilized to convict her; yet, in the same position, she may not be able to do exactly what the agents did in this particular case; that is why she did not do what the agents did . . . because for her to . . . [tape record unconsented conversations] would be illegal and I would ask to be able to continue to cross-examine Agent Hopson with respect to the second contact

that he had without any permission and without contacting defense counsel [(Tr. 41/App. 57a)] and without the knowledge of the United States Attorney's office.

THE COURT: Stop making a speech and stick to the law, if you please. (Tr. 42/App. 58a). (Emp. Sup.)

The Court refused to allow defense counsel the opportunity to use G-2 to assist the agent's memory (Tr. 42/App. 58a).

Hopson testified that the defendant called him to have him repeat how he could help her more than her attorney (Tr. 42/App. 58a). Seeing her a second time, he discussed the likelihood of her winning the case (Tr. 48/App. 64a) and that she could receive a severe sentence, if she did not cooperate (Tr. 46/App. 62a).

The Government continued to attempt to discover what was contained on the tapes on defense counsel's desk (Tr. 48/App. 64a) seized by the Court under protest (Tr. 49/App. 65a) before any agents continued to testify. After a recess, the court directed defense counsel to obtain a lawyer for himself (Tr. 50/App. 66a), but defense counsel advised the court of a federal case indicating that G-2 was not illegal (Id.).[4] Still, the Government attempted to warn counsel of his Miranda arrest rights (Tr. 51-52/App. 67a-68a), and the Assistant United States Attorney agreed that it would be necessary to listen to the tapes to determine whether or not the conversations of agents Bradley and Hopson were recorded (Tr. 52/App. 68a). Defense counsel's opportunity to respond to the

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[4] Parkhurst v. Kling, 266 F. Supp. 700 (E.D.Pa. 1967).

Government's position, was interrupted by the trial court who admonished counsel to "stop right there" (Tr. 53/App. 69a). Notwithstanding the court's admonishment, defense counsel stated for the record:

> [t]he only reason G-2 was utilized . . . was to help a witness remember what was said over a telephone conversation which he said was--initially he could not recall. The background as to the source of G-2 is only coming into the record as a result of this good Court's inquiries; and furthermore, there has been a confiscation, actually a seizure, of a tape recorder and two tapes that were on my desk[(Tr. 54/App. 70a)]. How the United States Attorney figures that they were relevant, I don't understand, but it was actually seized (Emp. Sup.) (Tr. 55/App. 71a).

The Assistant United States Attorney then represented to the court that he had "probable cause and a reasonable basis to believe that the contents of those tapes" violated Pennsylvania law (Tr. 55/App. 71a), when only minutes before he believed "that there is a possible violation of state law" (Tr. 52/App. 68a). "That is inaccurate" defense counsel advised the court (Tr. 55/App. 71a); yet, the prosecutor continued his efforts to discover what was contained on the confiscated tapes because "Mr. Cucinotta is unwilling to tell us whether or not the agent's voice is on those tapes . . . ," despite counsel's position that what was confiscated was "irrelevant" (Tr. 61/App. 77a).

The Court recessed and would not resume until defense counsel had his attorney present (Tr. 63/App. 79a). Members of the Philadelphia District Attorney's Office arrived with a signed search warrant in hand and were ready for execution of the warrant

(Tr. 67/App. 83a). They requested permission from the court for immediate seizure of the tapes (Tr. 68/App. 84a) which was denied (Tr. 69/App. 85a).

The first day of testimony ended with the request that the stipulated sequestration of Government agents remain in force; and that the Government not be given access to the confiscated tapes overnight (Tr. 70/App. 86a).

The second day of the hearing opened with the filing of a written Government Motion for the Release of Impounded Tapes and Recording Equipment and they argued in support of the request (Tr. 79/App. 95a). Counsel for Mr. Cucinotta again advised the court that no violation of law had occurred (Id.), but the Government continued its attempt to "be permitted to listent to the tapes . . . so that we would not waste the time of the court . . ." before continuing testimony (Tr. 80/App. 96a).

When it was decided that the tapes would be heard after the hearing, testimony on the defense Motion to Dismiss continued with the unexpected recall of agent Hopson, called "in the interest of justice" (Tr. 87/App. 102a). It will be recalled Hopson had already testified he had contact with the Assistant United States Attorney then in charge, John Riley, before contacting the defendant, and that he told her, "similar to the first meeting," (Tr.14/App. 30a) to contact her lawyer. Retaking the stand, however, he stated that he told her she should acquire a Public Defender (Tr. 89/App. 104a) because she could save the money (Id.).

He stated that he knew her defense attorney, but did not recall the type of representation she could acquire from her defense counsel (Tr. 89-90/App. 104a-105a).

Agent Bradley took the stand and stated that both he and Hopson knew who her lawyer was "at the first meeting . . . ." (Tr. 103/App. 118a). He recalled the use of bad language in the meeting with the defendant (Tr. 103/App. 118a), as did the respondent and her children.

Agent Dennis Malloy testified that he met the respondent's attorney along with the Assistant United States Attorney as early as May of 1978 (Tr. 106/App. 121a). He recalled how agent Hopson wanted to talk to the respondent. He "[i]n the normal course of working with the D.E.A.,[Malloy] . . . expected that Agent Hopson would negotiate with . . ." the respondent (Tr. 108/App. 123a); and that Hopson knew who the defendant's attorney was (Tr. 109/App. 124a) and that when he returned from the meetings with the defendant, Hopson reported that "nothing had transpired of use to either of us at that time" (Emp. Sup.) (Tr. 108/App. 123a). At the conclusion of the hearing, the Commonwealth and Federal prosecutors listened to the confiscated tapes and concluded that no violation of law had occurred (Tr. 178/App. 191a) as defense counsel had been indicating to them all along.[5]

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[5] The two tapes contained a recording of a Christmas Party and a law school lecture (Tr. 180/App. 193a).

## V. REASONS FOR DENYING THE PETITION

### SUMMARY OF ARGUMENT

A. THE OPINION OF THE THIRD CIRCUIT COURT OF APPEALS DISMISSING THE INDICTMENT WITH PREJUDICE IS NECESSARY, JUST AND IN CONFORMITY WITH ALL REPORTED CASES OF IDENTICAL GOVERNMENT MISCONDUCT.

B. THE OPINION IS IN CONFORMITY WITH THE LAW AS EXEMPLIFIED IN THE DECISIONS OF CASES INVOLVING SIMILAR BUT LESS EGREGIOUS CONDUCT.

C. THE THIRD CIRCUIT'S RULING REMEDIES THE ONGOING GOVERNMENTAL MISBEHAVIOR IN THE CASE IN CHIEF AND IN OTHER REPORTED AND UNREPORTED CASES.

### A.

The opinion of the Third Circuit Court of Appeals dismissing the indictment with prejudice is necessary, just and in conformity with all reported cases of identical government misconduct. The facts set forth above are undisputed. The Government intentionally, repeatedly and surreptitiously contacted the accused to induce her to abandon her defense and her counsel; and cooperate with the Government and defense counsel of the Government's choice. This process totally ignores and flaunts the historical, jurisprudential and democratic raison d'etre of criminal defense counsel and the adversary system, which can only be preserved by a dismissal of the charges.

The respondent submits that the charges against her must be dismissed with prejudice. No other remedy is adequate to rectify the Government's disregard of our adversary system as held in Commonwealth v. Manning, 359 N.E.2d 51 (App.Ct. 1977), rev., 367 N.E.2d 635 (Mass. S.Ct. 1977); People v. Moore, 57 Cal.App.3rd 437, 129 Cal.Rptr. 279 (1976); People v. Mason, 97 Misc.2d 706, 411 N.Y.S.2d 970 (1978); see also, Via v. Cliff, 470 F.2d 271 (3rd Cir. 1972).

In Manning, supra, the defendant was charged with selling drugs to a D.E.A. agent. On the eve of trial, August 22, 1974, D.E.A. agent Marchand merely telephoned the defendant at work without the knowledge or permission of the defendant's attorney to "'induce the defendant to become an informer and to cooperate with the Federal Agents in their ongoing investigation of traffic in narcotics.'" Id., 359 N.E.2d at 52. This is exactly what agents Hopson and Bradley attempted to do to respondent Morrison. Furthermore, during the course of the conversation, D.E.A. agent Marchand made several disparaging remarks about the defendant's counsel and the manner in which he was conducting the defense. He urged Manning to cooperate with the D.E.A. D.E.A. agent Marchand "indicated that the tactics of defense counsel would not insure the defendant being kept out of jail." Id.

In keeping with what the D.E.A. did in 1978 to Ms. Morrison:

> On August 23 [1974] the defendant, in the presence of his counsel, telephoned Marchand's office. Marchand was not in, and the defendant spoke with another D.E.A. agent identified only as "George". This second D.E.A. agent "in substance adopted the same line of conversation as agent Marchand had the previous day, speaking disparagingly of the tactics being pursued by counsel for the defendant and urged the defendant to cooperate with the Federal agents."

Manning, supra, 359 N.E.2d at 53.

The Appeals Court of Massachusetts reversed Manning's conviction and felt that a new trial should be ordered and the defendant allowed new counsel to be paid for by the State, without regard to indigency. This, the appeals court felt, would cure what had occurred.

Manning contended, as does your respondent, that allowing for a new trial and free defense counsel would specifically allow the Government to circumvent due process and the Sixth Amendment right to counsel. For "[i]n all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense." This right is a fundamental right to the concept of due process. Powell v. Alabama, 287 U.S. 45, 67-68 (1932).

Noting this contention in Manning, Justice Brown concurred only because of "[t]he fact that the officers guilty of misconduct were agents acting entirely independently of state law enforcement officials in approaching the defendant." Otherwise, he commented:

> I believe we should consider the implementation of a prophylactic rule in which the indictment against the defendant is dismissed where there was deliberate misconduct on the part of the law enforcement officers or prosecutors which interfered with the defendant's right to the effective assistance of counsel. Such a rule would likely have a stronger inhibiting effect on future police and prosecutorial conduct of this kind. See generally, Interrogatories in New Haven: The Impact of Miranda, 76 Yale L.J. 1519, 1550-1554 (1967).
>
> The defendant may also have available to him a civil action against the D.E.A. agents alleging interference with the attorney-client relationship. [Citations omitted].

359 N.E.2d at 56.

Parenthetically, one notes that the Third Circuit treated a civil rights claim which captures part of Justice Brown's reasoning. In Via v. Cliff, supra, the plaintiff alleged that his consultations with his attorney while in jail awaiting trial had been deliberately obstructed and cut short by jail officials. The Court held that if the officials' interference was either wrongfully motivated or without adequate justification, the plaintiff had established an

infringement of his constitutional right to counsel and need not additionally prove resultant prejudice. Id., 470 F.2d at 275.

When the appellate decision in Manning was appealed to the Massachusetts Supreme Court, the supreme court agreed that no prejudice need be shown. They also determined that Justice Brown's factual distinction that D.E.A. agents were involved together with innocent state investigators was irrelevant. The supreme court addressed the "sole issue of whether a new trial was the appropriate remedy for the constitutional violations found . . . ." Commonwealth v. Manning, 367 N.E.2d 635, 637 (1977) and the court concluded that the indictments should be dismissed as to both counts with prejudice. "The undisputed facts of the case show willful interference with Manning's constitutional right to counsel by two Federal officers who worked closely with the state prosecutor." Id. Continuing, the Court said:

> As a general rule, "any violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal of the conviction, in the absence of an affirmative showing by the Commonwealth that the error was harmless." [Citations omitted]. In the case now before us, we need not invoke a presumption of prejudice, as implicit in the motion judge's finding that there had been no "serious" impairment of the attorney-client relationship is a finding that the defendant had in fact been prejudiced to some extent. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed 2d 680 (1942). See, e.g., Geders v. United States, 425 U.S. 80,96 S.Ct. 1330, 47 L.Ed 2d 592 (1976); O'Brien v. United States, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed 2d 94 (1967); Black v. United States, 385 U.S. 26, 72 S.Ct. 190, 17 L.Ed 2d 26 (1966). We think the application of the harmless error rule singularly inapposite here.

> Further, we are of the opinion that the facts of the case demand that the indictment against the defendant be dismissed. We are confronted in this case not with the proverbial constable's blunder or even with good faith overzealousness in the pursuit of legitimate law enforcement aims. Rather, we have here a deliberate and intentional attack by government agents on the relationship between Manning and his counsel in a calculated attempt to coerce the defendant into abandoning his defense. While a balancing test may be appropriate in determing the proper scope of judicially created exclusionary rules, see, e.g., United States v. Janis, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed 2d 1046 (1976); United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed 2d 561 (1974), we do not think it the proper cause in the circumstances of this case. [Footnotes omitted].
>
> This focus must be rather on the remedy necessary to cure the impairment . . . , [367 N.E.2d at 637][T]he officers' misconduct was so pervasive as to preclude any confident assumption that proceedings at a new trial would be free of the taint.
>
> Further, another trial, even if Manning is provided with counsel at public expense, may subject him to an inexcusable risk of a more severe sentence were he reconvicted. We think the grant of a new trial is of dubious, if any benefit to the defendant. We also think that a stronger deterrent against the type of conduct demonstrated here is necessary. [Emp. Sup.].
>
> Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. The specific misconduct present in this case is particularly troublesome because only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts, and there is, in turn a grave danger that the courts themselves may become the instrumentality through which the government agents may effectuate threats to defendants regarding the consequences of asserting constitutional rights.

367 N.E.2d at 638.

In the case now before the Court, one immediately sees how the court became an instrumentality threatening the accused's right to counsel. How intimidating and revealing it was as the Government seized irrelevant tapes from counsel's desk?

Continuing in Manning:

> It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. In the case now before us, we find it unnecessary to adopt such a rule. The indictment itself is so inextricably interwoven with the misconduct which preceded it that the only appropriate remedy here is to dismiss the indictment. However, while we at this time adopt no rule of general applicability, we wish to leave no doubt that such conduct will not be tolerated in our criminal justice system.

In People v. Moore, 129 Cal.Rptr. 279, 57 Cal.App.3rd 437 (1976), after the defendant was arrested and unbeknownst to the defense counsel, "[a] beautiful investigator of the district attorney's investigation unit, Ms. Casey," contacted the defendant to assist in criminal investigations. Subsequently, after being told his attorney was inadequate, he began to cooperate. 129 Cal.Rpts. 279, 281. The Moore case cites a series of subsequent activities which could have occurred in Manning and to the respondent Morrison, if the importunings of the D.E.A. were successful. The court wrote:

> The People claim Moore was not denied aid of counsel at a critical stage of criminal proceedings because no plea bargain was achieved, and their use of Moore was for purposes unrelated to his own case. The People overlook the offers and assurances the district attorney's office gave Moore as to his own case.
>
> [T]he meager benefits Moore received from his unaided bargaining, underscore the prejudicial effect of acting without counsel . . . .[129 Cal.Rpts. at 281].
>
> At oral argument the People likened their intrusion into Moore's relationship with his attorney to a violation of the rights announced in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed 2d 694. They argue Moore's remedy is to exclude from his trial any evidence gained by their acts in that regard.

> This is not a case where the People have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of Miranda rights is tained evidence, and the exclusionary rule is adequate to cope with the violation.
>
> Here the People actively interfered with an attorney-client relationship established to defend Moore against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of Moore's right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is Moore's right to due process.
>
> Due process is not a yardstick of definite value, but rather is an embodiment of the traditional notions of fair play and justice (Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed 183). It is clearly violated when a defendant is denied counsel in criminal proceedings (People v. Mora, 120 Cal.App.2d 896, 900, 262 P.2d 594; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed 2d 799), but may also be denied under circumstances which do not include an outright refusal to provide counsel.

129 Cal.Rpts. at 282. (Emp. Sup.).

The charges remained dismissed and the judgment of the trial court was affirmed.

In People v. Mason, 97 Misc.2d 706, 411 N.Y.S.2d 970 (Sup.Ct. 1978), the defendant was told to cooperate with the D.E.A. Defense counsel even complained to the court, but the D.E.A. persisted and indicated that the defendant's attorney was "young, inexperienced, and clearly no match for" the prosecutor, 411 N.Y.S.2d at 973; the defendant subsequently became an informant based on promises of probation which the sentencing law disallowed. The charges were dismissed because of the violation of the Sixth Amendment.

In sum, the reported cases that are on all fours with the case at bar resulted in a dismissal of the charges without a showing at

prejudice. No prejudice need be shown because of the magnitude of the infringement of the right of counsel in this case. The Government intruded on this right without a waiver by respondent. Regardless of whether or not the intrusions "were wholly unrelated to the criminal charges pending," Moore, supra, 129 Cal.Rptr. at 282, a waiver of counsel must be "an intentional relinquishment of a known right," Johnson v. Zerbst, 304 U.S. 458, 464 (1939), and must be made "completely and intelligently," Id. at 468. Thus, in Gallarelli v. United States, 441 F.2d 1402 (3rd Cir. 1971), the defendant's right to counsel was infringed at sentencing and the sentence was vacated. No prejudice need be shown. See, e.g., United States, ex rel Wagner v. Myers, 234 F. Supp. 239 (E.D.Pa. 1964); see also, Hamilton v. Alabama, 368 U.S. 52 157 (1961); and White v. Maryland, 373 U.S. 59 (1963).

B.

The opinion of the Third Circuit Court of Appeals is in conformity with the law as exemplified in the decisions of cases involving similar but less egregious conduct.

In cases that do not involve wrongfully motivated attempts to subvert an accused's confidence in defense counsel, e.g., Manning, supra, Mason, supra, Moore, supra, nor intentional attempts to curtail attorney-client communications, e.g., Via v. Cliff, supra, but involve an undercover agent's discovery of attorney-client communications the decision of the Third Circuit at bar finds additional support.

In Weatherford v. Bursey, 429 U.S. 545 (1977), Weatherford was an undercover agent who, with Bursey, was charged with vandalism. Both were arrested and at the invitation of Bursey, participated in pre-trial defense discussions. None of the information gleaned by Weatherford was transmitted to the prosecutor. After conviction, Bursey filed suit under 42 USC §1983 against the agent and his superior for denial of his Sixth Amendment right to counsel. The question for the Court was whether a denial occurred. This Court found none, because no information was communicated to the prosecution. 429 U.S. at 556. Had communication occurred, a conviction can be dismissed. E.g., United States v. Levy, 577 F.2d 200 (3rd Cir. 1978); United States v. Peters, 468 F. Supp. 364 (S.D.Fla. 1979); accord, Mastrain v. McManus, 554 F.2d 813, 821 (8th Cir. 1977); see also United States v. Orman, 417 F. Supp. 1126 (D.Colo. 1976) involving D.E.A. interception of attorney-client communications.

In Weatherford, dissenting Justices Marshall and Brennan believed the record supported a denial of the Sixth Amendment and a cause of action under §1983. The language they used is, however, enlightening because the record now before the Court is even more egregious.

> [Even] . . . what occurred here [was] "the obvious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure." Boyd v. United States, 116 U.S. 616, 635, 29 L.Ed 746, 6 S.Ct. 524 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications.

> There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications between defendants and their lawyers. First, the integrity of the adversary system and the fairness of trials is undermined . . . . [Emp. Sup.].

Weatherford v. Bursey, 429 U.S. 545, 562 (1977).

In an earlier case, also involving attorney-client communication discovery, the Second Circuit Court of Appeals wrote:

> When conduct of a Government agent touches upon a relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of a fatal intrusion and must be accordingly carefully scrutinized . . . . The per se rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt . . . .
>
> "[I]f circumstances warranted it we would not shrink from such a result." United States v. Rosner, [485 F.2d 1213, 1288 (2d Cir. 1973)].

United States v. Gardner, 518 F.2d 633, 623 (2d Cir. 1975).

United States v. Acosta, 526 F.2d 670 (5th Cir. 1976), cert. denied, 426 U.S. 920 (1976) did not involve a surruptitious and conscious effort to subvert and destroy the right to counsel and the adversary system; however, the language supports the decision in Morrison. In Acosta the prosecution and the testifying informant managed to, inter alia, cover up the deal the informant had with the prosecutor and the informant's criminal record until defense cross-examination. The trial court dismissed the charges after the conviction because of "outrageous" conduct of the D.E.A. The Circuit Court reversed the trial court because the suppression by the prosecution had no "impact on the verdict" since all was brought out by adept defense counsel. The unchecked behavior of the D.E.A. in the instant case, however,

has a deeper and more incidious impact on all verdicts. Indeed, the Third Circuit opinion herein recognized that attempts to disparage defense counsel creates the danger of courts becoming "the unwitting instrumentability through which Government agents may interfere with basic constitutional rights." United States v. Morrison, 602 F.2d at 533. Curiously, the D.E.A. in Acosta requested that the Fifth Circuit determine that the judiciary has no power to dismiss an indictment, but the wisdom of the Fifth Circuit is captured in their answer: "we need not indulge in dictum as to whether the law empowers a District Judge to dismiss an indictment . . . on account of prosecutorial misconduct. We decline the Government's invitation to do so and leave the point for the day when, and if, it arises . . . ." 526 F.2d at 675. See also, United States v. Weiss, 599 F.2d 730 (5th Cir. 1979) where agents met with defendant on matters not regarding his pending charges, an equivocation attempted in the case before the Court, but Weiss' counsel was not disparaged.

United States v. Glover, 596 F.2d 857 (9th Cir. 1979), also supports the Third Circuit's Morrison opinion. In Glover, the FBI held conversations with the defendant without the consent of the defendant's attorney.

> The facts here are clearly distinguishable from those in Manning. The most damaging interference with the attorney-client relationship there was the impression the D.E.A. agents attempted to convey that defendant's counsel was incompetent. The effects of disparaging comments about counsel, particularly where coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship and are not easily expelled.

Id., 596 F.2d at 861.

Repeatedly, the D.E.A. rises to the occasion to intimidate, chill and destroy the constitutional rights of our citizens. How is it that their name appears again and again? One can wonder how lengthy the "citations" would be if the D.E.A.'s intials could be Sheapardized as in a computer search!

In United States v. Owen, 580 F.2d 365 (9th Cir, 1978) after conviction but before sentencing, the D.E.A. agents approached the defendant who was represented by two lawyers, one of whom gave his consent to the agents to interview the client. The purpose of the visit was to have the defendant cooperate in an investigation of one of his lawyers. Denying the defendant's request for a dismissal of charges, the Circuit Court stated that the judiciary has the power to dismiss indictments to discourage future Governmental impropriety and quoted this Court's decision in United States v. Russell, 411 U.S. 423, 431-32 (1973) that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." This language is prophetic, as it fits the current record.

Clearly had the Fifth or Ninth Circuits reviewed the record in Morrison the decision would be the same, This is because it is the correct interpretation of the importance of the right to counsel and the adversary system.[6]

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[6] In support of the proposition that the Third Circuit's opinion below conflicts with "standards established by several other circuits," (Government's Petition for Certiorari, p. 19), cases

Furthermore, the Second Circuit appears to support the Third Circuit's opinion in Morrison. In United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973) a co-defendant was an informer and the defendant requested a dismissal without the showing of prejudice. Although the case deals with interception of attorney-client communications, the language relates to the more serious attempts not only to intercept but also to decimate the attorney-client relationship, stating:

> A per se rule must . . . be thought of in terms of sanction against the Government rather than as a search for truth. Illegal wiretapping may be so far beyond the bounds of Governmental propriety that it is offensive to a rule of liberty under law. (Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed 2d 576 (1967)). The use of a dummy defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same cloth. [Citations omitted]. The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different . . . .
>
> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court in the Hoffa case, considered Coplon, supra, and Caldwell, supra, so strongly urged upon us by appellant, as cases which "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." Hoffa v. United States, supra, 385 U.S. at 306, 87 S.Ct. at 416. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge Cardozo's phrase. (People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).) It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of

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are cited where the several Circuit Courts were presented with totally different facts or are related in a most tenuous way. See e.g., United States v. Jernigan, 582 F.2d 1211 (9th Cir. 1978) which deals with whether the D.E.A. must notify a subject of a wiretap; and United States v. Stanford, 589 F.2d 285 (7th Cir. 1978) dealing with pre-trial publicity, cited at p. 21 of the Government's Petition.

law for all others. See Mr. Justice Holmes dissenting in Olmstead v. United States, 277 U.S. 438, 469, 48 S.Ct. 564, 72 L.Ed 944 (1928). [Emp. Sup.].

United States v. Rosner, 485 F.2d at 1227.

Indeed, inherent prejudice can be found upon consideration of the fact that by not accepting the overtures of the agents, the respondent: (a) did not receive the benefit of leniency which was covertly promised to her by the agents; (b) the possibility of a lenient recommendation by the United States Attorney at her sentencing was lost as promised by the agents in their threats; (c) after the agents conduct was completed, all future decisions of her and her counsel become tainted in that she will never know whether she would have received a lesser sentence had she cooperated; (d) the conduct prejudiced the strength of her counsel's ability to maintain his office and execute his duties as the respondent's chosen attorney; and finally (e) the agents' threats and disparagements irreparably tainted and beclouded the respondent's right to rely on unencumbered and trustworthy advice from her counsel to an incalculable degree.

C.

The Third Circuit's rule remedies the ongoing Governmental misbehavior in the case in chief and in other reported and unreported cases.

There is a line of reasoning in factual circumstances involving interception of attorney-client communications that dismissal would be appropriate if the activity is considered "widespread." E.g., Weatherford v. Bursey, supra; cf., United States v. Broward, 594 F.2d

345, 351 (2d Cir. 1979), cert. denied, ___ U.S. ___ (1979). Keeping in mind that the aforesaid cases do not involve an attempt to decimate the attorney-client relationship, the mere existence of the cases cited in this Response Brief arguably, in itself, demonstrates widespread activity.

Indeed, the Government's Petition For Certiorari in the case before the Court implicitly admits the existence of other unreported cases. "[T]he Court of Appeals' ruling can be expected to produce significant delay in a substantial number of future criminal cases," Government's Petition, p. 10; and, "may perceptibly increase the already heavy burden on the federal criminal process by giving rise to a large number of motions . . . ." Id., p. 22. This is the same reason offered by the Government against the relief granted in Miranda v. Arizona, supra. Furthermore, the granting of relief without a showing of prejudice as referred to in Rosner, supra, is not novel. See Strunk v. United States, 412 U.S. 434 (1973); Barber v. Municipal Court, 157 Cal.Rptr. 664 (1979).

## CONCLUSION

The Petition should be denied.

The opinion of the Third Circuit is correct. It is consistent with all known reported cases. The issue and question presented to this Most Honorable Court of last resort must primarily focus on our adversary system and secondarily on the position of the respondent after the intrusion. Weatherford, supra, 429 U.S. at 562. Dismissal is the only remedy otherwise the Government's behavior is sanctioned.

A reversal of the Third Circuit's decision, will sanction the behavior of the D.E.A. in this case. All Government Agencies will then be allowed to seek to dismiss those defense attorneys who do not assist the Government's investigators of criminal conduct. If the importunings of the agents are successful, defense counsel becomes an agent of the Government instead of the defendant. It opens a pandora's box recognized in this Court's language when attempts are made to make "nice calculations" as to the effect on the attorney-client relationship. Glasser v. United States, 315 U.S. 60, 76 (1942). Conceivably, the defense attorney selected by the Government may be an unwitting instrumentality of the D.E.A. One can imagine D.E.A. agents referring defendants to inexperienced or easily intimidated counsellors for their own purposes. It could also legitimize the specter of corrupted defense attorneys working directly with the D.E.A. Cf., Messelt v. Alabama, 595 F.2d 247 (5th Cir. 1979) (defense counsel asks prosecutor to increase charges against defendant so he could collect his fee).

To sanction or allow the Government to subvert a citizen's confidence in counsel of her choice, also places the entire judicial system in the hands of the D.E.A. Indeed, the courts themselves become an unwitting instrumentability in the corruption of the judicial system. This corruption is clearly exemplified in this case. The record thoroughly demonstrates that the Government lied to the Court about the involvement of their agents in the attempt to disparage the competence of defense counsel, and sought to

convince the trial court that the effectiveness of counsel was not discussed. The only reason the Government was unable to hide and cover-up the magnitude of the agents dispicable acts was due to their fear of discovery and perjury charges when they thought their conversations with the respondent were on tape. Motivated to continue the ruse, the record reveals a calculated and concerted effort to determine what was contained on the tapes by utilization of search warrants, contempt citations, threats of arrest and loss of defense counsel's license to practice (Tr, 180/App. 193a).

Thus, the Third Circuit's decision is to safeguard not only one's right to counsel, but the entire adversary system. There is no conflict with other jurisdiction. There are similar cases of outrageous Government misconduct and cases involving the interception of attorney-client communications, but they do not conflict with the facts on the record in this case. On the contrary, they support the Morrison decision.

If dismissal is not required, then we literally abandon our adversary system in favor of an inquisitorial system because when the agents do not get caught in their effort to choose defense counsel, the trier of fact receives input from only one source. Decisions will be based on only what the Government was the judiciary to know. This is not only absurd, but anathema to our sence of justice and fairplay.

Respectfully submitted,

SALVATORE J. CUCINOTTA, ESQUIRE
Counsel for Respondent

January, 1980

No. 79-395

# In the Supreme Court of the United States

OCTOBER TERM, 1979

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

HAZEL MORRISON

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### QUESTION PRESENTED

Whether dismissal of an indictment with prejudice is an appropriate sanction for law enforcement officers' misconduct that did not injure respondent.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–11a) is reported at 602 F.2d 529.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 12a–13a) was entered on May 10, 1979. A petition for rehearing was denied on July 10, 1979 (Pet. App. 14a–25a). On July 30, 1979, Mr. Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 8, 1979. The petition was filed on September 7, 1979, and was granted on June 30, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

## STATEMENT

In an indictment filed in June 1978 in the United States District Court for the Eastern District of Pennsylvania, respondent was charged with two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). Under an agreement with the government, she pleaded guilty to one count but reserved the right to appeal the district court's denial of her motion to dismiss the indictment. She was sentenced to five

years' imprisonment, to be followed by a three-year special parole term.

Before entering her plea, respondent moved to dismiss the indictment on the ground that agents of the Drug Enforcement Administration had improperly visited and interviewed her after her indictment in the absence of defense counsel. She alleged that this conduct violated her Sixth Amendment right to the effective assistance of counsel and deprived her of a fair trial. Following an evidentiary hearing, the district court denied the motion.

1. The evidence presented at the hearing showed that on the afternoon of August 23, 1978, DEA agents Stephen Hopson and James Bradley visited respondent at her residence in an effort to obtain her cooperation in their investigation of a major heroin dealer. Before he and Agent Bradley went to see respondent, Agent Hopson discussed her case with Dennis Malloy, the DEA agent primarily responsible for the investigation that led to respondent's arrest and indictment (Pet. App. 3a).[1] Agent Malloy knew that Agent Hopson hoped to secure respondent's assistance, and he permitted Hopson to examine the file on her case (*ibid.*). Although Agents Hopson and Bradley knew of the criminal charges pending against respondent, they did not notify her attorney or the United States Attorney's office that they wished to

[1] At the time he spoke with Agent Hopson, Agent Malloy knew that respondent was represented by retained defense counsel. As early as May 31, 1978, Agent Malloy and an Assistant United States Attorney had met with respondent's attorney for negotiations concerning the charges that would be filed against her (Pet. App. 3a).

interview her (*id.* at 3a–4a). Instead, they simply went to her house and questioned her about the source of her heroin during the period prior to her arrest. They told her that she faced a lengthy jail sentence and that, if she cooperated in their investigation, they would make a favorable sentencing recommendation to the United States Attorney. They also told her about the government's protection plan for informants (*id.* at 4a).[2]

Agent Hopson asked respondent whether she was represented by private counsel or by an attorney from the public defender's office. When she identified her retained counsel, Agent Hopson inquired how much she had paid him. Respondent said that she had paid him $200. Agent Hopson replied that he had seen the attorney's work in connection with another case in the past, and he suggested that respondent think about the kind of legal representation she could expect for the amount of money she was paying.[3] Agent Hopson also recommended that respondent seek the assistance

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[2] Respondent testified that the agents warned her that the trial judge in her case was "the worst SOB in the federal courtroom" (Pet. App. 4a n.3; A. 128a). The agents testified that they did not recall the specifics of this conversation, and they were never directly asked whether they had referred to the trial judge in such derogatory terms (Pet. App. 4a n.3; A. 24a–46a, 58a–63a, 108a–119a).

"A." refers to respondent's appendix in the court of appeals, 10 copies of which have been lodged with the Clerk of this Court.

[3] Respondent testified (A. 127a–128a) that Agent Hopson told her that her lawyer could not do anything for her and that all he wanted was her money. According to respondent, the agent warned that "'[i]f you decide to fight your case, your lawyer is

of a public defender if she wished to cooperate with the DEA (Pet. App. 4a; A. 104a–105a). Respondent did not give the DEA agents any information concerning her own case or the heroin dealer under investigation by Agents Hopson and Bradley. Agent Hopson left his telephone number with respondent, and the agents departed.

Respondent immediately called her attorney, and he went to her house. While he was there, respondent called Agent Hopson and arranged a meeting for the following day (Pet. App. 4a). Agent Hopson did not appear at the appointed hour, but he did visit respondent's house several hours later. When he arrived, respondent told him that she had company and therefore could not talk (*ibid.*; A. 140a, 169a). Promising to call later in the evening, Agent Hopson left. That night, between 9 and 10 p.m., Agent Hopson called respondent to arrange an appointment for the next day, August 25 (A. 141a, 156a–158a). Respondent testified that she told Agent Hopson that she wished to have her attorney present at such a meeting and that the morning hour proposed by the agent was

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going to make a[n] asshole out of hisself [sic] and you, too, in the courtroom.'" Respondent's son and sister also testified that Agent Hopson referred to respondent's attorney as an "asshole" (A. 166a–170a, 175a). Agent Hopson's account of the conversation did not include any mention of such an epithet, and he was not asked directly whether he had used the term. On direct examination by the Assistant United States Attorney, Agent Hopson was asked, "Did you make any comments specifically concerning [respondent's attorney]?" He replied, "I don't recall. I said that I was a case agent against [him] in the past. I don't recall any further representation. I may have; I may not have" (A. 104a–105a).

inconvenient because she had a dental appointment (A. 60a, 156a–158a).

The record does not show whether respondent and Agent Hopson agreed on a time for a meeting the next day, but, in any event, Agents Hopson and Bradley did visit respondent's house again on August 25, 1978. The conversation between them and respondent was similar to the one that had occurred two days earlier (Pet. App. 5a; A. 61a). Respondent told the agents that she had nothing to say and would speak with them only in the presence of her attorney (A. 112a, 141a–142a). The agents were annoyed, because they believed respondent's telephone call to Agent Hopson the previous afternoon meant that she was willing to cooperate with the DEA investigation. Agent Bradley testified (A. 117a–118a): "[B]oth of us actually were perturbed, not [to] the point of raising our voices, but we were disappointed and a little bit angered that we had to make a worthless trip out there." Agent Bradley told respondent that any further discussions would take place in the United States Attorney's office in the presence of her attorney (A. 112a, 118a). He then left the house, and Agent Hopson followed a few minutes later (A. 117a, 144a).[4]

2. Six days later, on August 31, 1978, respondent entered into a conditional plea agreement with the

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[4] Respondent testified (A. 144a) that after Agent Bradley left the house, Agent Hopson stated that her "'goddamn ass [would be] going to jail'" and that the trial judge to whom her case was assigned "'hate[s] black people.'" Agent Hopson recalled the August 25 conversation only in general terms, and he was not asked about the specific remarks attributed to him by respondent later in the hearing (A. 58a–63a).

United States Attorney. She agreed to plead guilty to the first count of the indictment, and the government agreed to dismiss the second count. She agreed to withdraw her remaining pretrial motions in the event the district court denied her motion to dismiss on the basis of the DEA agents' misconduct, and the government agreed that she could reserve her right to appeal such a denial, notwithstanding her guilty plea (A. 196a–198a, 209a–210a).

The district court denied respondent's motion to dismiss without opinion (A. 196a), and respondent formally entered her plea of guilty. In the ensuing Rule 11 proceeding (A. 205a–215a), respondent admitted that on April 12, 1977, she sold 26.56 grams of heroin to a government informant for $1,600. She also expressed agreement with the informant's statement that he had purchased heroin from her on numerous previous occasions and that, while her husband was in prison, she ran their heroin business from her home. Throughout the plea bargaining with the United States Attorney's office and the subsequent Rule 11 proceeding, respondent was represented by the same attorney who had represented her since the spring of 1978, before the indictment against her was returned by the grand jury.

3. The court of appeals reversed and directed the district court to dismiss both counts of the indictment with prejudice (Pet. App. 1a–11a). The court acknowledged that the district court had not made any findings of fact in connection with respondent's motion to dismiss (*id.* at 2a n.2); it ruled, however, that dismissal of the indictment was justified solely on the basis of the

undisputed facts and the testimony of the government's witnesses taken at face value (*ibid.*). The court did not disagree with the government's contention that respondent was not prejudiced by the DEA agents' misconduct in this case. Indeed, the court explicitly stated (*id.* at 11a) that "the importuning of the government agents [was] unsuccessful" and did not result in respondent's abandoning her counsel or providing information useful to the prosecution. Nonetheless, the court held that the indictment should be dismissed because of the agents' "deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial" (*ibid.*). The court observed that violations of the Sixth Amendment frequently may be remedied by the suppression of evidence obtained as the result of the misconduct or by the ordering of a new trial where a conviction has been tainted in some way by government interference with the attorney-client relationship (*id.* at 8a). Here, however, the agents' error "is not amenable to remedy through suppression or reversal of conviction" (*id.* at 10a). For that reason, the court concluded, dismissal of the indictment is an appropriate sanction.

The government's petition for rehearing was denied (Pet. App. 14a). Three judges of the court of appeals voted to grant rehearing en banc (Pet. App. 15a–25a). In an opinion joined by Judge Rosenn, Judge Garth stated that "the extreme sanction of dismissing the indictment" should not be imposed simply because "the panel cannot think of an appropriate sanction to correlate with the non-prejudicial, albeit inexcusable,

conduct of the government in this case" (Pet. App. 18a). Stressing that respondent did not show or even claim that she was prejudiced by the government's misconduct (*id.* at 21a), Judge Garth warned that "as a result of the panel's decision, a defendant finding himself in this situation may be better off by alleging no prejudice than by claiming he was harmed by the government's misconduct. In the latter case, he may be granted a new trial or if he has pled guilty, his plea may be vacated. But if he succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*id.* at 22a).

Judge Garth stated (Pet. App. 22a–23a) that he agreed with the analysis of the Second Circuit in *United States* v. *Broward*, 594 F.2d 345, cert. denied, 442 U.S. 941 (1979). There, the court of appeals held that dismissal of an indictment is generally not an appropriate remedy when no prejudice is shown. The court said that in the absence of prejudice, dismissal should be considered, if at all, only in "the truly extreme cases," for example, a case in which such a drastic remedy is necessary "to deter a pattern of demonstrated and longstanding widespread or continuous official misconduct" (594 F.2d at 351). Because there was no allegation or proof of "widespread, routine, constant or continuous" government misconduct in this case, Judge Garth concluded (Pet. App. 24a) that the public should not be "punished for the misconduct of a government agent" when that misconduct did not harm respondent.

Judge Adams voted for rehearing en banc (Pet. App. 24a–25a) because he viewed the question pre-

sented as "sufficiently important to warrant the attention of the full Court" and because the *Broward* decision "was not brought to the attention of the panel before its opinion was filed."

## SUMMARY OF ARGUMENT

### I

Respondent's Sixth Amendment right to the assistance of counsel was not violated in this case, because the criminal prosecution against her was not affected in any way by the DEA agents' misconduct. The Sixth Amendment lists a number of rights that the accused shall enjoy in all criminal prosecutions. The Amendment is concerned with protecting the fairness of criminal proceedings, and, when the fairness of such proceedings is not compromised, the Amendment is not violated. Here, respondent had the assistance of counsel for her defense at all stages of the prosecution. The DEA agents' effort to secure respondent's cooperation and to persuade her to change attorneys was completely unsuccessful: the agents obtained no information relevant to their investigation of major heroin traffickers, they obtained no incriminating evidence against respondent, and they failed to convince respondent to abandon her retained counsel. Nor has it been argued that their actions impaired counsel's effectiveness. This, of course, is not to suggest that the agents' disparagement of defense counsel was proper. It is only to say that, in the circumstances of this case, the agents' improper actions did not affect the criminal prosecution against respondent, and, for that reason,

her Sixth Amendment right to the assistance of counsel was not infringed.

## II

Even assuming that the DEA agents' conduct did violate respondent's Sixth Amendment right to counsel, dismissal of the indictment was an inappropriate sanction in the absence of any prejudice to respondent's ability to defend herself at trial. Ordinarily, judicial remedies are designed to redress injuries actually suffered. If a defendant is denied the assistance of counsel at trial, he is entitled to a new trial at which he is represented by an attorney. But if an alleged constitutional violation has had absolutely no effect on a criminal prosecution, then there is no justification for remedying that violation in the course of the criminal proceeding. It is especially objectionable to *terminate* a criminal prosecution in such circumstances, because that relief is more extreme than what is usually thought sufficient even in situations where a constitutional infringement *has* had some substantial impact on the defendant's trial prospects.

If there must be some remedy for every constitutional violation, even one that causes no injury, then that remedy should be awarded in a separate proceeding, such as a civil action for damages, that does not interfere with the fair disposition of legitimate criminal charges. The government action of which respondent complains closely resembles a civil tort. It occurred long after respondent's criminal offense and did not influence her guilty plea to the charges against her. Particularly in the absence of any suggestion that

the DEA agents' misconduct is part of a pattern of continuing abuse of the criminal process, respondent should not be relieved of criminal responsibility for her acts on the basis of an incident that had no impact whatever on her prosecution.

## ARGUMENT

Respondent has admitted selling heroin to a government informant in April 1977. The question presented in this case is whether respondent should escape criminal liability for her offense because, in August 1978, 16 months after the illegal narcotics sale, she was questioned by DEA agents in the absence of her attorney and was urged to cooperate in an ongoing DEA investigation of a third party and, toward that end, to obtain the assistance of different counsel.

Neither the court of appeals nor respondent herself has suggested that she suffered any prejudice as a consequence of the DEA agents' misconduct. Respondent rebuffed the agents' advances and immediately notified her attorney. The agents obtained no information from respondent. They learned nothing about her case or about the suspected narcotics dealer who was the subject of their investigation. Respondent's representation by counsel of her choice was uninterrupted. The record below and respondent's brief in opposition in this Court do not contain the slightest hint that respondent's potential defense at trial was damaged or rendered more difficult by the agents' visits or that her decision to plead guilty was in any way influenced by the DEA representatives.

Before accepting respondent's guilty plea, the district court found that it was knowingly and voluntarily made. Respondent does not contend otherwise. Nor does respondent assert that the extent of injury caused by the agents' improper intervention is unknown or unknowable. The simple fact is that, whatever the constitutional implications of the agents' actions, their immediate practical effect on respondent's prosecution and her relationship with her attorney was nil.

Nevertheless, respondent argues, and the court of appeals held, that the indictment against her should be dismissed. The court's decision necessarily involves a ruling on both the alleged violation of a constitutional right belonging to respondent and the appropriate remedy for such a violation, assuming one occurred. The government's position is that dismissal of an indictment is improper where the defendant complains of government misconduct unrelated to the commission of the offense with which he or she is charged and fails to make any showing that the objectionable behavior affected his or her ability to defend against the criminal charges. Viewed from one perspective, this absence of prejudice negates the existence of any constitutional violation; seen another way, it establishes that the drastic remedy of a judicial dismissal of criminal charges is not justified, even though some infringement of constitutional rights may have occurred. The choice between these two analytic paths may be problematical, but both lead to the conclusion that respondent's indictment should not have been dismissed. For present purposes, at least, it makes no practical

difference whether a showing of prejudice is regarded as an essential part of the proof of a constitutional violation or merely a prerequisite for imposition of the severe sanction of dismissal.[5] In either event, the court of appeals erred.

We proceed, therefore, to develop two alternative but parallel arguments. First, we argue that, because the DEA agents' misconduct did not have any prejudicial effect on respondent's defense strategy or her relationship with her attorney, she did not suffer any violation of her Sixth Amendment right to the assistance of counsel. Second, we contend that, because respondent was not injured by the agents' actions, dismissal of her indictment is an inappropriate remedy for any Sixth Amendment violation that did occur during the agents' conversations with respondent outside the presence of her attorney.

## I

## THE DEA AGENTS' MISCONDUCT DID NOT VIOLATE RESPONDENT'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL

In attempting to determine whether the DEA agents' actions violated respondent's constitutional right to the assistance of counsel, we begin with the language of the Sixth Amendment. The Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

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[5] The difference might be material in the context of a civil action for damages. See note 12, *infra*.

There is no question that in the present case respondent had the assistance of counsel at all critical stages of the prosecution against her. She retained an attorney soon after her arrest, and he promptly began negotiations with government attorneys, approximately one month before the indictment against respondent was returned (Pet. App. 2a–3a). The same attorney represented respondent throughout the proceedings in the district court and the court of appeals, and he continues to represent her, now on a court-appointed basis, in this Court. Respondent does not suggest that defense counsel's assistance was impaired at any stage of the proceedings. In short, the requirement imposed by the unadorned language of the Sixth Amendment seems clearly to have been satisfied in this case. Respondent had "the Assistance of Counsel for [her] defence," and she thus enjoyed fully the constitutional protection explicitly guaranteed by the relevant portion of the Sixth Amendment.

Respondent argues, however, that her Sixth Amendment right to counsel was violated because law enforcement officers deliberately questioned her in the absence of her attorney and tried to persuade her to change counsel to facilitate her cooperation with the government. Both respondent and the court of appeals focus on the impropriety of the agents' conduct rather than its effect on respondent. But, for purposes of the Sixth Amendment, and most other Bill of Rights provisions as well, the critical consideration is the actual impact of governmental action on the individual. The court of appeals' failure to recognize this point is the fundamental flaw in its decision. Law enforcement of-

ficers may behave rudely or arbitrarily, they may even violate administrative regulations or statutes specifically intended to govern their actions, but they do not deprive a person of his constitutional rights unless their misconduct has some practical effect on that person.

This point can be illustrated, in the constitutional context most pertinent here, through an examination of the Sixth Amendment as a whole. The Amendment establishes not only an accused's right to the assistance of counsel but also a variety of other procedural guarantees designed to ensure the fairness of criminal prosecutions. The accused is entitled to a speedy and public trial by an impartial jury in the state and district where the alleged offense was committed. He is entitled to be informed of the charges against him, to be confronted with the witnesses against him, and to have the benefit of compulsory process for obtaining witnesses in his favor. All of these rights concern the fairness of criminal trials. They reflect the Framers' insistence that persons charged with criminal offenses be convicted and punished only after a trial satisfying certain specified minimal standards of procedural fairness. Because the various clauses of the Sixth Amendment all focus on the fairness of criminal proceedings, it is to that subject that courts should address themselves in determining whether any Sxith Amendment right has been violated. See, *e.g.*, *United States* v. *Wade*, 388 U.S. 218, 226–227 (1967). Overreaching law enforcement officers may improperly attempt to thwart or interfere with the exercise of a Sixth Amendment right, but, if the effort is unsuc-

cessful and the right fully exercised, the fairness of the underlying criminal proceeding is unaffected and no constitutional deprivation has occurred.

This does not mean, of course, that such misconduct by government agents should be condoned or encouraged. Police efforts to intrude on a criminal defendant's relationship with his attorney are no less improper because they fail. It does mean, however, that the court of appeals erred in concluding (Pet. App. 7a–8a) that the dispositive factor in determining whether respondent's right to counsel was violated is the wrongful motivation of the government agents involved. That wrongful motivation may bear heavily on the need for administrative reform within the DEA or for disciplinary measures against Agents Hopson or Bradley. But it is largely irrelevant to the question whether respondent was denied "the Assistance of Counsel for [her] defence."

Of course, one might object to this line of reasoning on the ground that it makes the existence of a constitutional violation depend too heavily on the reaction of the person at whom government misconduct is directed. It might at first seem anomalous that the question whether a person's right to counsel has been violated should turn in such large measure on how he or she responds to objectionable actions by law enforcement officers. In fact, however, such considerations are frequently critical in constitutional litigation, and it is commonplace for courts to rule that the occurrence of a constitutional violation depends in part on factors beyond the knowledge or control of government agents.

The analogy to Fourth Amendment cases is instructive in this regard. Suppose that overzealous law enforcement officers, unconcerned about the constitutional protection against unreasonable searches, burst unannounced into a dwelling that they fully believe is occupied. If they discover to their surprise that the dwelling is uninhabited and abandoned, or if the occupants for some reason lack a legitimate expectation of privacy in the dwelling, the officers may well commit no Fourth Amendment violation, although their intent deliberately to ignore the Amendment's provision is no less offensive for that reason. Indeed, in *Scott* v. *United States*, 436 U.S. 128 (1978), this Court expressly held that the subjective intent of law enforcement officers not to comply with a minimization requirement in a district court's wiretap order was not, by itself, sufficient to establish a constitutional or statutory violation, in the absence of some evidence that objectively unreasonable interceptions of conversations occurred. By the same token in the present case, although the conduct of the DEA agents would have been improper whatever the reception accorded it by respondent, respondent's adamant refusal to cooperate with the agents and her undisputed allegiance to her attorney successfully averted any Sixth Amendment violation that might otherwise have occurred.[5a]

This view is supported by *Weatherford* v. *Bursey*, 429 U.S. 545 (1977). There, the Court declined to find

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[5a] See also *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) ("proof of prejudice is generally a necessary but not sufficient element of a due process claim" based on pre-indictment delay).

a violation of the right to the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments, even though an undercover state police agent was present at meetings between a criminal defendant and his attorney. The Court emphasized that the agent's intrusion did not produce any evidence used against the defendant at trial and did not result in the communication of defense strategy to the prosecution (*id.* at 558). Because the agent's attendance at the meetings did not have any effect on the defendant's trial and conviction, the Court held that the defendant had not suffered any deprivation of his constitutional rights. *Weatherford* thus indicates that some showing of prejudice is a prerequisite to a finding that alleged government misconduct violated the Sixth Amendment.

Both respondent and the court of appeals (Pet. App. 6a–8a) have attempted to distinguish *Weatherford* from the present case on the ground that *Weatherford* did not involve a "wrongly motivated intrusion into the attorney-client relationship." By contrast to the DEA agents' deliberate attempts to undermine respondent's relationship with defense counsel as a means of securing her cooperation in an investigation of third parties, the undercover officer in *Weatherford* passively attended a meeting between the defendant and his attorney solely in order to maintain the secret of his identity and thus to preserve his effectiveness as an undercover investigator. The Court recognized "the unfortunate necessity of undercover work" (429 U.S. at 557) and observed that the officer attended the meeting only in order to avoid raising suspicion and

only at the invitation of the defendant and his lawyer. The Court concluded that there had been no "purposeful intrusion" (*id.* at 558) into the attorney-client relationship.

The Court did not hold or even suggest, however, that such a "purposeful intrusion," without more, would automatically establish a Sixth Amendment violation. On the contrary, the Court's opinion, read as a whole, demonstrates that government invasions of the attorney-client relationship, whatever their motivation, must be evaluated in terms of their effect on the fairness of the criminal trials that follow. The Court explained (429 U.S. at 554) that it might well have reached a different result, notwithstanding Weatherford's legitimate motives for attending the attorney-client conference, if the agent's attendance had operated to Bursey's disadvantage.

> Had Weatherford testified at Bursey's trial as to the conversation between Bursey and Wise; had any of the State's evidence originated in these conversations; had those overheard conversations been used in any other way to the substantial detriment of Bursey; or even had the prosecution learned from Weatherford, an undercover agent, the details of the Bursey-Wise conversations about trial preparations, Bursey would have a much stronger case.

And, in concluding the relevant portion of its opinion, the Court stated flatly (*id.* at 558) that "unless Weatherford communicated the substance of the Bursey-Wise conversations and thereby created at least a realistic possibility of injury to Bursey or benefit to

the State, there can be no Sixth Amendment violation."[6]

The indispensability of trial prejudice as an element of a Sixth Amendment violation is also reflected in other decisions of this Court. For example, in *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), the Court held that a criminal defendant "was denied the basic protections of [the Sixth Amendment] *when there was used against him at his trial* evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and

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[6] Federal courts of appeals other than the Third Circuit have endorsed the reading of *Weatherford* espoused here. See, *e.g.*, *United States* v. *Irwin*, 612 F.2d 1182 (9th Cir. 1980), discussing *Weatherford* and drawing the following conclusion (*id.* at 1186–1187; footnotes omitted):

> [I]t is apparent that mere government intrusion into the attorney-client relationship, although not condoned by the court, is not of itself violative of the Sixth Amendment right to counsel. Rather the right is only violated when the intrusion substantially prejudices the defendant. Prejudice can manifest itself in several ways. It results when evidence gained through the interference is used against the defendant at trial. It also can result from the prosecution's use of confidential information pertaining to the defense plans and strategy, from government influence which destroys the defendant's confidence in his attorney, and from other actions designed to give the prosecution an unfair advantage at trial.

See also *United States* v. *Dien*, 609 F.2d 1038, 1043 (2d Cir. 1979) (emphasis added), stating that in *Weatherford*,

> the Supreme Court held that to establish a Sixth Amendment violation where an informant sat in on defense strategy sessions defendants were required to establish that privileged information had been passed to the government or that the government had intentionally invaded the attorney client relationship, *and resulting prejudice*.

in the absence of his counsel" (emphasis added). Nowhere in the *Massiah* opinion did the Court say that the defendant's right to counsel had been violated by the way in which the government obtained his incriminating statements. Rather, the Court carefully explained that, because of the way the statements had been obtained, their use at trial violated the Sixth Amendment (*id.* at 202, 203, 207).

Likewise, in *United States* v. *Henry*, No. 79–121 (June 16, 1980), the Court characterized the question presented as "whether respondent's Sixth Amendment right to the assistance of counsel was violated *by the admission at trial* of incriminating statements made by respondent to his cellmate, an undisclosed government informant, after indictment and while in custody" (slip op. 1; emphasis added). To be sure, later in its opinion (slip op. 10) the Court did state that "[b]y intentionally creating a situation likely to induce [respondent] to make incriminating statements without the assistance of counsel, the government violated [respondent's] Sixth Amendment right to counsel." We believe, however, that the latter statement, made in summation at the conclusion of the Court's opinion, should not be permitted to divert attention from the theme of trial prejudice stressed in *Massiah* and reemphasized at the beginning of the *Henry* decision. Any different approach would result in a holding that a defendant in the position of Massiah or Henry suffers an infringement of his Sixth Amendment rights even if he does not speak to the government agent or informant who engages him in conversation. Such a holding would be inconsistent with the final paragraph of the

*Massiah* opinion, in which the Court explicitly eschewed the opportunity to find fault with the government's investigative methods and observed that the constitutional problem in the case arose only because the statements obtained from Massiah were used against him at trial. In response to the government's argument that the challenged interception of Massiah's conversation was a necessary and proper method of investigating the suspected larger criminal enterprise of which Massiah was a part, the Court stated (377 U.S. at 206–207):

> We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial. [7]

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[7] With respect to the DEA agents' conduct in the present case, we are not certain that any judicially cognizable impropriety would have been involved had the agents merely approached respondent in the absence of her counsel for the purpose of obtaining information regarding criminal activity by third parties. (As we explain at pages 43–45, *infra*, even this conduct alone, in the absence of extenuating circumstances, would have violated internal Department of Justice guidelines.) But, however that may be, the agents' actual conduct here was unquestionably improper, because of the apparent effort to disparage defense counsel. Although we argue that this behavior is without constitutional consequence because it did not affect respondent's

We have been unable to discover any case in which this Court has found a violation of the Sixth Amendment in a situation where the fairness of the criminal proceedings against a defendant has not been compromised. On some occasions, of course, where there has been a direct interference with defense counsel's efforts to assist his client at trial, the Court has not required a specific demonstration of the precise way in which that interference or deprivation has affected the defendant adversely. The Sixth Amendment entitles the accused to "the Assistance of Counsel for his defence," and, when the accused has been compelled to proceed without counsel or when counsel has been prevented from discharging his normal functions at trial, the Court has not hesitated to find a Sixth Amendment violation without any more detailed showing of prejudice. See, *e.g.*, *Geders* v. *United States*, 425 U.S. 80 (1976) (defense counsel prevented from consulting with his client during an overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (counsel denied the opportunity to make a summation of evidence before the rendition of judgment); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (indigent defendant denied the assistance of counsel in a felony trial); *Ferguson* v. *Georgia*, 365 U.S. 570 (1961) (defense counsel denied the opportunity to ask defendant questions when defendant made statement at trial); *Glasser* v. *United States*, 315 U.S. 60 (1942) (defendant's retained counsel appointed by the court to represent a co-defendant as well). In such situations, the defend-

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confidence in her attorney, we do not intimate that the agents' negative comments about defense counsel were in any way justifiable.

ant simply has not received what the Constitution expressly guarantees, and that in itself is sufficient to establish that the Sixth Amendment's standards of fairness in criminal prosecutions have not been satisfied.

In other cases, the leading example of which is *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Court has ruled that events occurring before trial have so hampered defense counsel in his ability to represent the accused at trial that the constitutional guarantee would be vitiated if the results of the trial were allowed to stand. See, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (remanded for determination whether lack of counsel at pre-indictment preliminary hearing prejudiced defendants at their later trial); *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961) (absence of counsel at post-indictment arraignment "may affect the whole trial"); *Hawk* v. *Olson*, 326 U.S. 271 (1945) (denial of requested 24-hour continuance after arraignment to enable accused to consult counsel, subpoena witnesses, and prepare defense); *Williams* v. *Kaiser*, 323 U.S. 471 (1945) (lack of counsel at guilty plea proceeding).

Finally, in a third group of cases, the Court has held that, because certain incriminating evidence was acquired from the defendant in the absence of counsel, that evidence and any additional evidence derived from it may not be introduced at the defendant's trial. The rationale of these decisions is that, if the constitutional right to the assistance of counsel at trial is to be meaningful, a criminal conviction cannot be based on evidence obtained from an uncounselled defendant, after the initiation of criminal proceedings and before

trial, under circumstances in which the presence of an attorney might significantly affect the character of the evidence obtained or its subsequent presentation and evaluation at trial. See, *e.g.*, *Massiah* v. *United States*, *supra* (post-indictment conversation with government informant monitored by police); *United States* v. *Wade*, *supra* (post-indictment lineup); *Moore* v. *Illinois*, 434 U.S. 220 (1977) (confrontation with complaining witness at pre-indictment preliminary hearing). And compare *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) (custodial interrogation immediately after arrest), with *Kirby* v. *Illinois*, 406 U.S. 682 (1972) (confrontation with complaining witness at police station two days after crime). See also *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975) ("The Court has identified as 'critical stages' those pretrial procedures *that would impair defense on the merits* if the accused is required to proceed without counsel" (emphasis added)).

Throughout all these cases, the Court has focused on the role of defense counsel in criminal prosecutions and, in particular, criminal trials. When counsel has been absent in some setting outside the judicial arena (*e.g.*, at a police lineup involving the defendant or during questioning of the defendant by government agents), the Court has found a Sixth Amendment violation only when the government has obtained incriminating evidence from the defendant at the time of counsel's absence and has then introduced that evidence, or other evidence derived from it, at the defendant's trial.[8] The Court has never found a Sixth

[8] For example, the Court in *Wade* was careful to explain that defense counsel should have been present at the post-indictment

Amendment violation solely on the ground that government agents have interviewed a defendant or conducted a lineup involving him outside the presence of his attorney. Assuming that such a procedure occurs after the beginning of a criminal prosecution and without the authorization of defense counsel, the defendant nevertheless suffers no denial of his Sixth Amendment right to counsel, as long as the unauthorized government contact does not affect the defendant's prosecution.

The unauthorized interview or lineup may have no effect on the defendant's prosecution because it does not produce any evidence or information that tends to incriminate the defendant or assist the prosecution. Alternatively, the procedure may have no effect on the prosecution because any incriminating evidence or other useful information that is produced is not used, directly or indirectly, by the government at trial. Such non-use of probative evidence may occur as the result of a suppression order or a voluntary decision by the government. For present purposes, it is irrelevant

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lineup only because the lineup could have affected the defendant's trial, not because the lineup itself threatened to impose some disability on the defendant or to violate his constitutional rights. The Court stated (388 U.S. at 236–237) (footnote omitted):

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel] . . . as at the trial itself." *Powell* v. *Alabama*, 287 U.S. 45, 57.

why, in a particular situation, an unauthorized government contact with a defendant in the absence of his attorney does not affect that defendant's prosecution. The important point here is that effect on a criminal prosecution is the criterion by which such extrajudicial contacts should be judged, and when no such effect can be identified, no Sixth Amendment violation has occurred.[9]

## II

## EVEN IF THE DEA AGENTS' CONDUCT VIOLATED RESPONDENT'S SIXTH AMENDMENT RIGHTS, DISMISSAL OF THE INDICTMENT IS AN INAPPROPRIATE SANCTION

We assume for the remainder of this brief that, contrary to the argument elaborated in point I of the brief, the DEA agents' questioning of respondent and their recommendation that she obtain a different attorney did violate her constitutional right to the assistance of counsel, guaranteed by the Sixth Amendment. Indeed, we now assume for the sake of argu-

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[9] Accordingly, in the Sixth Amendment context, the suppression of improperly obtained evidence can serve to avert the occurrence of any constitutional violation, if, through such an exclusion, the court can prevent an unauthorized government contact with a defendant in the absence of counsel from having any effect on the defendant's prosecution. By contrast, in the Fourth Amendment setting, the suppression of improperly obtained evidence is intended to deprive the government of the fruits of a constitutional violation that has already occurred, namely, an illegal search or seizure. The exclusion of evidence in the Fourth Amendment context does not directly repair the unconstitutional invasion of privacy that has already occurred but is designed instead to deter future violations of a similar nature.

ment that the court of appeals was correct in its apparent holding (Pet. App. 7a) that the Sixth Amendment is violated whenever a wrongly motivated government agent seeks to intrude on a criminal defendant's relationship with his attorney. Having made this assumption, however, we continue to submit that the court of appeals' disposition of this case was wrong. That is because a significant question regarding the appropriate remedy remains to be resolved once a court has found that a constitutional violation has occurred. Here, the court of appeals applied the extreme sanction of dismissal of a criminal indictment with prejudice, even though respondent was not injured in any way by the DEA agents' misconduct. By awarding relief so thoroughly disproportionate to the actual harm incurred by respondent, the court of appeals erred.

Courts ordinarily tailor their remedies to fit the injury suffered in a particular situation. For example, when counsel is denied altogether, and a defendant is convicted after a trial at which he is not represented by an attorney, a reviewing court will order a new trial and will direct that the defendant be permitted to retain counsel or that counsel be appointed. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Gideon* v. *Wainwright*, *supra*. Likewise, when judicial action before or during trial prevents counsel from rendering full and effective assistance to his client at trial and the client is convicted, the conviction will be overturned and a new trial ordered. See, *e.g.*, *Geders* v. *United States*, *supra*; *Herring* v. *New York*, *supra*; *Powell* v. *Alabama*, *supra*.

Similarly, when government agents improperly overhear pretrial conversations between a defendant and his lawyer, and the defendant is subsequently convicted, a new trial may be ordered to ensure that the conviction is not based on wrongfully obtained information regarding the defendant's trial strategy or other matters material to the trial. *Black* v. *United States*, 385 U.S. 26 (1966); *O'Brien* v. *United States*, 386 U.S. 345 (1967). Alternatively, the district court may be required to conduct a hearing on the effect of the intrusion on the fairness of defendant's trial and to order a new trial if it determines that the conviction is tainted by the interference with the attorney-client relationship. See *Black* v. *United States*, *supra*, 385 U.S. at 29–31 (Harlan, J., dissenting); *O'Brien* v. *United States*, *supra*, 386 U.S. at 345–347 (Harlan, J., dissenting). In an extreme case, where the taint cannot be purged by a new trial (*e.g.*, where the government has learned of confidential defense strategy and the court has no way to ensure that the government will not use this information in preparing for a second trial), it has been held that a court may order dismissal of the indictment to remedy a Sixth Amendment violation. See, *e.g.*, *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978); *United States* v. *Peters*, 468 F. Supp. 364 (S.D. Fla. 1979).

In other cases, when the defendant has the benefit of counsel at all judicial proceedings, but incriminating evidence is obtained from him outside of court in the absence of his attorney, the suppression of the evidence so obtained and any other evidence derived from it is sufficient to remedy whatever Sixth Amendment

violation may have occurred when the evidence was acquired. See, *e.g.*, *United States* v. *Wade*, *supra*; *Gilbert* v. *California*, 388 U.S. 263 (1967) (evidence obtained by lineup); *Massiah* v. *United States*, *supra*, (evidence obtained during post-indictment conversation with government informant). If such evidence is erroneously admitted and a conviction follows, a new trial will be ordered on appeal, unless a court determines that admission of the evidence was harmless error. See *Moore* v. *Illinois*, *supra*, 434 U.S. at 232; *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *United States* v. *Wade*, *supra*, 388 U.S. at 242.

Throughout all these cases, the critical consideration in choosing a remedy for a Sixth Amendment violation is the protection of the fairness of the criminal proceedings against the defendant. The remedy in any given case is no broader than is necessary to ensure that the defendant fully enjoys the right to "have the Assistance of Counsel for his defence." Even when a defendant receives no legal assistance whatever, as in *Johnson* v. *Zerbst*, *supra*, or *Gideon* v. *Wainwright*, *supra*, the Court has not said that the charges against him should be dismissed. Rather, the Court has ruled that the defendant should be provided with counsel and then retried with the help of a lawyer. The remedy should certainly not be more drastic where, as here, the fairness of criminal proceedings and the effectiveness of defense counsel's assistance have remained unimpaired by the Sixth Amendment violation of which the defendant complains.

The result reached by the court of appeals in this case essentially reverses the general remedial rule

that the extent of relief awarded varies directly with the extent of injury suffered. The dismissal of respondent's indictment, in the absence of any showing of prejudice, indicates that, at least in cases involving a "wrongly motivated intrusion into the attorney-client relationship," the court of appeals will award the greatest remedy to the defendants who have suffered the least harm. The court of appeals did not hold that any such wrongly motivated intrusion will inevitably result in the dismissal of an indictment. Rather, it ruled that such an extreme remedy will be ordered especially, and perhaps only, when other more common remedies are unavailable because the constitutional violation has not affected the criminal proceedings against the defendant in any way. The idea that the most far-reaching relief should be reserved for those cases in which the injury is least severe finds no support in this Court's prior decisions.

This Court has never suggested that a defendant who is the victim of intentional government misconduct is entitled to a dismissal of the indictment against him, even if he has suffered no prejudice as a result of the constitutional violation. Indeed, in the Fifth Amendment context, the Court has expressly ruled that dismissal of an indictment is too drastic a remedy for the acquisition of evidence in violation of the privilege against compulsory self-incrimination. The Court has not distinguished between intentional and inadvertent government misconduct in this regard. See *United States* v. *Blue*, 384 U.S. 251, 255 (1966) (footnote omitted), in which the Court stated:

> Even if we assume that the Government did acquire incriminating evidence in violation of the

> Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. * * * Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.

Likewise, in cases interpreting and implementing the Fourth Amendment, the Court has never ordered dismissal of an indictment as a remedy for an unconstitutional search or seizure, even when circumstances indicated that the police misconduct involved was deliberately unlawful. In particular, if a defendant had suffered an unconstitutional search that uncovered no evidence, we think it is virtually inconceivable that this Court would hold that, suppression of evidence being unavailable, it would be proper to dismiss the indictment.

Nor has the Court ever held that evidence seized in deliberate violation of a person's Fourth Amendment rights must, for that reason alone, always be suppressed in all judicial proceedings. In fact, in a variety of situations, even the remedy of excluding illegally seized evidence has been limited or held unavailable, on the basis of the Court's conclusion that such relief would not contribute appreciably to the goal of deterring future unlawful searches and seizures. See, *e.g.*, *United States* v. *Havens*, No. 79-305 (May 27, 1980), slip op. 6-7; *Rakas* v. *Illinois*, 439 U.S. 128 (1978);

*Stone* v. *Powell*, 428 U.S. 465 (1976); *United States* v. *Calandra*, 414 U.S. 338 (1974); *Alderman* v. *United States*, 394 U.S. 165 (1969). The Court's decisions in these cases did not depend on whether the police acted in good faith in their acquisition of incriminating evidence in violation of the Fourth Amendment. Even if the police had acted with a willful disregard for the constitutional rights of others, the Court was unwilling, in the particular circumstances involved, to incur a significant cost to the criminal justice process (*i.e.*, the suppression of probative evidence) without some concomitant foreseeable gain in the effort to deter future Fourth Amendment violations.[10] If even the remedy of suppression is regarded as too extreme in some cases where illegally seized evidence is used against a defendant and where injury is thus demonstrable, then surely the more drastic sanction of dismissal of an indictment is excessive where the government agents' unconstitutional behavior does not harm the defendant or anyone else.

There is simply no logical reason why a person who admittedly sold heroin to a government informant in April 1977 should be relieved of criminal responsibility for that act because she was improperly questioned by government agents in August 1978. The principal fal-

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[10] Of course, there may be other situations in which the good faith of law enforcement officers *is* material to the decision whether to apply the Fourth Amendment exclusionary rule. See *Scott* v. *United States*, *supra*, 436 U.S. at 136, 139 n.13. The Fifth Circuit, sitting en banc, has recently held as much. *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980). The point here, however, is that the bad faith of a police officer, without more, has never been thought to require a sanction against the prosecution in a criminal case.

lacy in the court of appeals' opinion is the court's implicit underlying assumption that, if the constitutional violation suffered by respondent is to be remedied at all, it must be remedied *in the criminal prosecution* pending against her. Of course, a person who has not suffered any discernible injury is ordinarily not entitled to any remedy whatever. But even assuming that anyone whose Sixth Amendment right to counsel has been violated is entitled to *some* relief, it does not follow that that relief must be awarded in a pending criminal proceeding. Where the criminal proceeding itself has not been affected by the government misconduct, it should not be aborted or otherwise curtailed. Rather, the defendant should be remitted to whatever civil remedies he may have against the government agents responsible for the constitutional violation or against the government itself as the agents' employer.

In the present case, the DEA agents' improper visits and conversations with respondent were not part of the criminal acts she performed 16 months earlier[11] and did not contribute to the government's ability to prosecute her for the distribution of heroin. Accordingly, if respondent can successfully claim any relief, she should be required to do so in some proceeding

[11] Cf. *Hampton* v. *United States*, 425 U.S. 484 (1976), in which petitioner contended that the Due Process Clause of the Fifth Amendment barred his conviction because law enforcement officers were excessively involved in the criminal enterprise. The plurality opinion stated (425 U.S. at 490): "If the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law."

separate from her criminal prosecution.[12] The adequate redress of essentially tortious conduct is, after all, one of the primary purposes of civil proceedings.

In his dissent from the court of appeals' denial of rehearing en banc, Judge Garth cogently exposed the logical flaws in the panel's reasoning. He explained that the court's finding of a constitutional violation does not lead inevitably to the conclusion that the indictment should be dismissed. On the contrary, "dismissal of the indictment is appropriate when the harm to the defendant cannot effectively be cured by less drastic means" (Pet. App. 21a). The court's decision, in Judge Garth's words, "turns [this rule] on its head"

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[12] Relying on *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), respondent may be able to state a cause of action for damages against the DEA agents on the basis of their alleged Sixth Amendment violations. Pet. App. 19a n.2, 22a n.4; *Davis* v. *Passman*, 442 U.S. 228 (1979). *Weatherford* itself was a damage suit, brought under 42 U.S.C. 1983, against the state undercover officer and another state official who was allegedly responsible for the intrusion of a police agent into the meeting between a criminal defendant and his attorney. See also *Via* v. *Cliff*, 470 F.2d 271 (3d Cir. 1972). On August 22, 1979, respondent filed a complaint in the United States District Court for the Eastern District of Pennsylvania, seeking $10,000 compensatory damages and $100,000 punitive damages against the DEA and Agents Hopson, Bradley, and Malloy for their roles in the incidents now under consideration. The suit is still at the discovery stage. It potentially presents several difficult factual and legal questions, *e.g.*, whether respondent will be able to prove actual damages even though she suffered no prejudice in her criminal case; whether punitive damages should be available in the absence of substantial actual damages; whether punitive damages are ever available in a *Bivens* action; whether federal law (the law that presumably governs *Bivens* actions) should adopt a punitive damages standard derived from state law or

(*ibid.*). The indictment is dismissed, not because the court cannot conceive of any other way to remedy the injury suffered by respondent, but because respondent was not injured and the court therefore cannot imagine any other remedy that is available. The consequences, as Judge Garth observed (*id.* at 22a), are little short of

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should develop its own common law standard. But however these questions may be resolved, the propriety of the court of appeals' dismissal of respondent's indictment will not be affected. That remedy remains inappropriate, regardless of whether other relief is available.

We note for the Court's information that the 95th Congress considered proposed legislation that would make a claim against the United States the exclusive civil remedy for many kinds of wrongful acts that may be performed by federal employees acting within the scope of their employment. See H.R. 9219, S. 2117, 95th Cong., 1st Sess. (1977). The bills provided that, with respect to constitutional tort claims, the United States would be liable for liquidated damages of $1,000, in the absence of proof of actual damages in a greater amount. See *Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 2 (1978). Similar legislation has been introduced in the 96th Congress (H.R. 2659), and the House Judiciary Committee held hearings on the bill during the summer of 1979. See *Amendment of the Federal Tort Claims Act: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979).

In addition, of course, although respondent could not have benefited directly from such action, the DEA agents in this case were subject to possible departmental disciplinary measures. In the petition for a writ of certiorari (Pet. 17 n.10), we informed the Court that DEA officials were actively considering the imposition of sanctions against Agent Hopson, including a possible temporary suspension. We have now been advised by the Chief Counsel's office of DEA that a two-day suspension of Agent Hopson was initially proposed and that, after full investigation, the agent received a written reprimand, a copy of which has been retained in his personnel file.

absurd. Not only is a criminal defendant immunized although government misconduct has caused her no harm, but future defendants are taught they "may be better off by alleging no prejudice" than by complaining of any injury suffered as the result of a constitutional violation (*ibid.*). In the latter event, the most likely remedies are the suppression of evidence, a new trial order, or an order vacating a tainted guilty plea. But, if a defendant "succeeds in proving the absence of prejudice, the indictment, under the panel's opinion, will be dismissed" (*ibid.*).

Federal courts of appeals other than the Third Circuit have consistently declined to dismiss indictments based on nonprejudicial government misconduct. Because allegations of government misconduct usually arise in distinctive factual situations, the circumstances of these earlier cases are often quite different from those presented here. Nevertheless, the fundamental point repeatedly asserted in other appellate opinions is directly applicable to the controversy now before the Court: where a defendant is not injured by improper government action, he is not entitled to a dismissal of his indictment as a remedy for that action.

For example, in *United States* v. *Fields*, 592 F.2d 638 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979), the court of appeals rejected the argument that a securities fraud indictment should be dismissed because attorneys at the Securities and Exchange Commission concluded a settlement with the defendants in a civil injunctive proceeding without disclosing that they had urged the United States Attorney to conduct a criminal investigation of the same transactions. The court of

appeals agreed that the SEC attorneys had acted improperly, but neither the defendants nor the court could identify "any resulting harm to defendants" (592 F.2d at 647). Accordingly, the court refused to dismiss the indictment, explaining that "[i]t is only in the rare case [of government misconduct], where it is impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor, that the indictment may be dismissed" (*id.* at 648). See also *United States* v. *Artuso*, 618 F.2d 192, 196–197 (2d Cir. 1980); *United States* v. *Brown*, 602 F.2d 1073, 1076–1078 (2d Cir.), cert. denied, 444 U.S. 952 (1979); *United States* v. *Broward*, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941 (1979); *United States* v. *Kilrain*, 566 F.2d 979, 982–983 (5th Cir.), cert. denied, 439 U.S. 819 (1978); *United States* v. *Acosta*, 526 F.2d 670, 674 (5th Cir.), cert. denied, 426 U.S. 920 (1976); *United States* v. *Jimenez*, No. 79–2190 (7th Cir. Aug. 6, 1980), slip op. 5–6; *United States* v. *Stanford*, 589 F.2d 285, 299–300 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); *United States* v. *Crow Dog*, 532 F.2d 1182, 1196–1197 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Glover*, 596 F.2d 857, 861–864 (9th Cir.), cert. denied, 444 U.S. 860 (1979); *United States* v. *Owen*, 580 F.2d 365, 367–368 (9th Cir. 1978). But see the dictum in *United States* v. *McCord*, 509 F.2d 334, 348–351 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975) ("serious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused," but "prejudice, actual or po-

tential, is relevant" (509 F.2d at 349, 350) to the determination).

In answer to this line of authority, respondent relies primarily on three state cases, two of which are easily distinguishable from the present situation by virtue of the prejudice suffered by the defendant as a consequence of the behavior of law enforcement officers. In *People* v. *Mason*, 97 Misc. 2d 706, 411 N.Y.S.2d 970 (Sup. Ct. 1978), local detectives destroyed the defendant's relationship with his Legal Aid attorney by telling the defendant that defense counsel was "young, inexperienced, and clearly no match" for the city prosecutors who would be handling his case. Over the Legal Aid attorney's objection, the defendant, while under indictment for distributing controlled substances, became an informant for the anti-corruption prosecutor, assisting in the investigation of an alleged scheme to "fix" narcotics cases through payments to someone in the New York City criminal court building. The defendant contacted the suspected architect of the scheme and was referred to a defense attorney. This attorney was then substituted as defendant's counsel in the narcotics prosecution pending against him. For approximately six months, the defendant had no independent legal assistance but was advised only by a lawyer who may well have been part of the criminal activity that the defendant was helping to investigate. Moreover, the anti-corruption prosecutor misled the defendant into believing that his cooperation would have a favorable effect on the disposition of the outstanding narcotics charges against him, when the prosecutor well knew that the relevant New York

statute severely circumscribed the sentencing options available to a trial judge. Under these circumstances, and in view of the passage of several years since the defendant's arrest and indictment, the state court concluded that the defendant had been adversely affected by the government's interference with his right to counsel and that the damage to his ability to defend himself against the narcotics charges could not be repaired by the appointment of new counsel. Accordingly, the court dismissed the indictment.

Similarly, in *People* v. *Moore*, 57 Cal. App. 3d 437, 129 Cal. Rptr. 279 (Ct. App. 1976), the State used the defendant as an undercover informant while criminal charges were pending against him. The defendant was explicitly instructed not to inform his attorney about his dealings with the district attorney's office, and one of the state investigators falsely told the defendant that his attorney was inadequate and had been disbarred. State officials also advised the defendant to leave a false telephone number with his attorney. On one occasion, approximately five months after the defendant had begun his cooperation, after he had already testified for the State at two trials, including a murder trial, and after he had suffered two physical attacks apparently motivated by his performance as an informant, he was arrested for a parole violation. Defense counsel was not informed of his whereabouts, and the defendant was not released to attend a pretrial conference on the pending charges against him. When counsel could not explain his client's absence, the court, unaware that the defendant was already incarcerated at the city jail, issued a bench warrant for his

arrest. When all these events came to light, the trial judge dismissed the charges against the defendant, and the intermediate appellate court affirmed. The court of appeal held that the State's conduct had "debased the attorney-client relationship" and had deprived the defendant of the effective assistance of counsel during the period of the defendant's cooperation, thereby jeopardizing his personal safety and causing him to "relinquish[ ] the basis on which he and his counsel might have reached a favorable plea bargain with the district attorney" (57 Cal. App. 3d at 441, 129 Cal. Rptr. at 281).

In both *Mason* and *Moore*, the defendants were obviously prejudiced by the government misconduct, and the state courts found that the injuries suffered could not be redressed by any relief short of a dismissal of the indictment. Among the three state cases on which respondent chiefly relies, only *Commonwealth* v. *Manning*, 373 Mass. 438, 367 N.E. 2d 635 (1977), involves a factual situation that resembles the one presented here. The similarity between *Manning* and the present case is unmistakable, and the Supreme Judicial Court of Massachusetts held that the indictment should be dismissed with prejudice notwithstanding trial court findings (i) that the relationship of the defendant with his attorney was not seriously impaired by the misconduct of government agents and (ii) that the defense offered at trial was not adversely affected by the agents' disparaging remarks about defense counsel or by their efforts to elicit the defendant's cooperation in an ongoing narcotics investigation. The Supreme Judicial Court explained that, in its view,

"[p]rophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights" (373 Mass. at 444, 367 N.E. 2d at 639). The court therefore reversed the judgment of the intermediate appellate court[13] and set aside the defendant's convictions.

We believe that *Manning* was wrongly decided for the same reasons that the court of appeals' decision in the present case was erroneous. If the defendant in *Manning* suffered any injury as the result of the government misconduct, he was entitled to relief for that injury. But if the criminal proceedings against him, like those against respondent, were not prejudiced in any way by the wrongful actions of law enforcement officers, he was not entitled to any remedy in those proceedings, and he certainly was not entitled to a dismissal of the indictment against him. The New Jersey Supreme Court has recently adopted this reasoning in a case involving deliberate and extensive government eavesdropping on conversations between a defendant in custody and his attorneys. The court

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[13] The intermediate appellate court had declined to dismiss the indictment but had offered the defendant a new trial with different counsel of his choice, the attorney fees to be paid by the county without regard to any question of indigency, if the defendant requested such relief after announcement of the court's decision. See *Commonwealth* v. *Manning*, 5 Mass. App. 25, 359 N.E. 2d 51 (1977). The intermediate court stressed that the motions judge in the court below had found no "'*serious* impairment of the relation of counsel and client'" as a result of the agents' misconduct. Implicit in that finding, the appellate court thought, was "a finding that the defendant had been prejudiced to some extent" by the misconduct (359 N.E. 2d at 55). Accordingly, the court deemed it appropriate to offer the defendant a new trial if he wanted one.

stressed that no witnesses or evidence tainted by the State's monitoring of the attorney-client conversations could be used in the criminal proceedings against the defendant. At the same time, however, the court refused to dismiss the indictment. The court stated that "dismissal of a prosecution is the appropriate remedy for official intrusion upon attorney-client relationships only where it destroys that relationship or reveals defendant's trial strategy." *State* v. *Sugar*, 27 Crim. L. Rep. (BNA) 2453, 2454 (July 24, 1980). Since the State's eavesdropping had not produced either of these results, the court declined to terminate the prosecution. This is the approach that should have been followed in *Manning* and by the court of appeals in the present case.

One further matter remains to be addressed. Both the Second Circuit and the Seventh Circuit have observed in dicta that, although prejudice in a criminal prosecution is ordinarily a prerequisite for a judicial dismissal of an indictment as a remedy for government misconduct, the same drastic relief may be appropriate even in the absence of prejudice (presumably as an exercise of "supervisory" power) if the court finds "a pattern of demonstrated and longstanding widespread or continuous official misconduct." *United States* v. *Broward*, *supra*, 594 F.2d at 351. See also *United States* v. *Fields*, *supra*, 592 F.2d at 647–648; *United States* v. *Stanford*, *supra*, 589 F.2d at 299–300. Assuming for the sake of argument that dismissal of criminal indictments would be a proper judicial sanction in such circumstances, the court of appeals' action in the present case is still unjustifiable. Neither the

court below nor respondent has suggested that the DEA agents' behavior in visiting respondent outside the presence of her attorney is anything but an isolated instance of misconduct by individual law enforcement officers. *Commonwealth* v. *Manning*, *supra*, is apparently the only other reported case involving an effort by DEA agents to persuade a criminal defendant to cooperate with the government and obtain different counsel. The relevant events in *Manning* occurred four years before those in the present case, in a completely different location. Different agents were involved. In no sense do the actions of the agents in *Manning* and this case represent DEA policy or standard operating procedure.

On the contrary, at the time of the DEA agents' investigation in this case, Paragraph II(C)(2) of the DEA Domestic Operations Guidelines required that the approval of the appropriate prosecutor be obtained before any DEA agent could seek the cooperation of a defendant-informant. That requirement remains in effect today. On September 11, 1979, in response to the decision below, the DEA Chief Counsel's office issued a legal comment describing the facts of the case and the Third Circuit's ruling and concluding with the following instruction:

> *UNDER NO CIRCUMSTANCES, REGARDLESS OF WHETHER THE DEFENDANT HAS RETAINED COUNSEL, SHALL ANY DEA AGENT ATTEMPT TO CONTACT, OR CONTACT A POTENTIAL DEFENDANT-INFORMANT WITHOUT THE PRIOR, EXPRESS APPROVAL OF THE UNITED STATES ATTORNEY HANDLING THE CASE.*

In addition, on June 30, 1980, the Deputy Attorney General responded to an inquiry from Representative Don Edwards, Chairman of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, regarding the conduct of agents of the Federal Bureau of Investigation in interviewing an incarcerated defendant in the absence of his attorney in *United States* v. *Glover, supra,* 596 F.2d at 859–864. In his letter, which is reprinted in full as an appendix to this brief, the Deputy Attorney General emphasized that "the facts of the *Glover* case are most unusual and do not typify the kinds of contacts between agents and represented defendants that we regard as proper." The Deputy Attorney General stated that "[a]s a matter of general practice, * * * government lawyers and agents should avoid any discussion relating to pending charges with a represented defendant unless they have received the consent of his attorney." The letter then identified three illustrative situations that together help to demonstrate why an absolute rule flatly prohibiting all such conversations would be undesirable. These are: (i) when a represented defendant seeks out the agent or prosecutor and insists on communicating without the knowledge of his attorney; (ii) when the represented defendant continues to be engaged in criminal conduct other than that for which he is under indictment; and (iii) when the government is seeking information critical to the safety of life or limb. The Deputy Attorney General assured Representative Edwards that, in the event of extenuating circumstances other than those listed above, representatives of the Department of Justice will be permitted to interview a represented defendant without notifying

counsel only after obtaining the specific authorization of a United States Attorney or other appropriate Department official. On August 11, 1980, the Director of the FBI circulated to all Bureau offices a policy directive incorporating the substance of the Deputy Attorney General's letter.

Particularly in light of these supervisory efforts within the Executive Branch to prevent the recurrence of the kind of misconduct involved here, there is no justification for dismissing the indictment against respondent as a means of deterring "a pattern of demonstrated and longstanding widespread or continuous official misconduct."

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

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SEPTEMBER 1980

## APPENDIX

**U.S. DEPARTMENT OF JUSTICE**
**OFFICE OF THE DEPUTY ATTORNEY GENERAL**

June 30, 1980

The Deputy Attorney General
Washington, D.C. 20530

Honorable Don Edwards
Chairman, Subcommittee on Civil
and Constitutional Rights
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Your letter of November 20, 1979, to the Attorney General regarding the *Glover* case has been brought to my attention. I apologize for the delay in following up our interim response.

As you note, the problem of investigating and interviewing indicted defendants recurs from time to time and often poses difficult ethical and legal questions. Fortunately, however, the facts of the *Glover* case are most unusual and do not typify the kinds of contacts between agents and represented defendants that we regard as proper.

For the last several months the Department has been exploring the issues raised by direct communications between government officials and represented defendants. Under established case law, the Sixth Amendment right to the advice and presence of counsel can be waived by a represented defendant even

outside the presence of counsel. After exhaustive research the Department's Office of Legal Counsel has also determined that interviews by the goverment with represented defendants conducted without prior notice to counsel are permissible under the American Bar Association's disciplinary rules where the interviews are necessary to the performance of the Department's statutory duty to prosecute offenses against the United States. Nevertheless, we recognize that such interviews raise difficult policy questions: the Department of Justice's obligation to conduct criminal investigations must be balanced against the important interest in fostering effective attorney-client relationships.

We expect in the reasonably near future to promulgate new policy in this area to govern the conduct of the Department's prosecutors and investigative agents, including agents in the Federal Bureau of Investigation and the Drug Enforcement Administration. Although the policy is still under review we are able to provide you with a brief outline of our likely approach.

As a matter of general practice, we believe that government lawyers and agents should avoid any discussion relating to pending charges with a represented defendant unless they have received the consent of his attorney. We believe this policy is important in order to promote the effectiveness of the attorney-client relationship between a defendant and his counsel. Prosecutors and agents have been, and will continue to be, sensitized to this general principle.

There will be, however, a number of situations in which interview of a defendant without the knowledge or consent of his counsel may be appropriate. First, there are occasions when a represented defendant seeks out the agent or prosecutor and insists on communicating without the knowledge of his attorney. Often such contacts are initiated when the defendant claims that his life or family will be in physical jeopardy if his counsel—who may represent others in the alleged criminal enterprise—were aware of the nature of the communications which the defendant wishes to make to the government. In these circumstances, the defendant should be advised of his right to retain separate counsel and advised that the government is willing to aid him in seeking confidential court appointment of separate counsel. Once this advice is given, we believe that communications can proceed so long as there is a clear, knowing and intelligent waiver of the right to a counsel, preferably in writing.

A second exception to the general rule against direct contacts with a defendant arises where the represented defendant may continue to be engaged in criminal conduct other than that for which he is under indictment. In this type of situation, the government may employ undercover agents or operatives to communicate with the defendant in an effort to foil his plans and to prosecute him for the separate offenses. Plainly, the fact that the defendant has been indicted on one charge cannot serve to immunize him from the use of ordinary investigative techniques with respect to other criminal activities in which he may be involved. In such a situation, it is possible—although not

the design of the government—that communications can arise relating to the pending offense. Consistent with the Supreme Court's recent ruling in *United States* v. *Henry*, No. 79-121 (June 16, 1980), we instruct our operatives not to deliberately elicit from such defendants statements concerning the pending charges, and we caution them to do their best to minimize any such communications that may nevertheless occur. We also take other precautions to avoid potential problems in this area, although these steps are not always successful. In this type of situation, it is clearly not feasible to seek to retain or appoint separate counsel.

Third, there may be circumstances where the government is seeking information critical to the safety of life or limb—for example, the location of a kidnapping victim—from a represented defendant and there is substantial reason to believe that the presence of counsel will delay or impede the flow of the needed information. This should be a rare case and should be undertaken only when those in supervisory positions are convinced there are no feasible alternatives.

We do not suggest that the foregoing represents an exhaustive catalog of the situations which may arise where there will have to be contacts between government representatives and a represented defendant without the knowledge or consent of his attorney. On the contrary, we believe they illustrate some of the reasons that it is impossible to approach this area with absolute hard and fast rules, and they underscore the need to apply general rules flexibly to meet unforeseen contingencies. Accordingly, in addition to the forego-

ing, our policy will permit Department representatives to conduct interviews of a represented defendant without notifying counsel on the basis of extenuating circumstances (such as defense counsel's involvement in the criminal offense or other serious conflict of interest) if but only if a United States Attorney or other appropriate Department of Justice official specifically authorizes the contact.

In all cases, we will continue, in accordance with constitutional requirements, to advise the individual of his *Miranda* rights. If the individual has already retained counsel, we will continue to inform the individual of his right to have that lawyer or another lawyer present.

In conclusion, we neither endorse nor condone situations, such as those alleged in *Glover*, where a government agent misrepresents the position of a defendant's counsel or disregards an explicit ruling by a court. We emphasize again, however, that this scenario is most atypical; and we will do our best to prevent such occurrences from arising in the future.

We appreciate your interest in this matter. Please do not hesitate to contact us if there is any further information we can provide.

Sincerely,

/s/ CHARLES B. RENFREW
Charles B. Renfrew

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 328308 77

No. 79-395

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED STATES OF AMERICA, *Petitioner,*

v.

HAZEL MORRISON, *Respondent.*

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**On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

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## BRIEF FOR THE RESPONDENT

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## QUESTION PRESENTED

Did the Third Circuit Court of Appeals err in dismissing the indictment with prejudice due to investigatorial and prosecutorial misconduct, which included, *inter alia,* interviewing the accused without presence of counsel, disparaging accused's counsel's competence, encouraging accused to discharge counsel and retain cooperative counsel chosen by the prosecution, threatening accused with harsher treatment at sentencing, to force her to cooperate, and thereafter manipulating the Court in order to prevent full disclosure of such misconduct? No.

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No. 79-395

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, *Petitioner,*

v.

HAZEL MORRISON, *Respondent.*

**On A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF FOR THE RESPONDENT

### I. Opinion Below

The opinion of the Court of Appeals for the Third Circuit is reported at 602 F.2d 529 (1979).

### II. Jurisdiction

This Court has jurisdiction under 28 U.S.C. §1254(1).

### III. Counter-Statement Of The Question Presented

Did the Third Circuit Court of Appeals err in dismissing the indictment with prejudice due to in-

vestigatorial and prosecutorial misconduct, which included, *inter alia,* interviewing the accused without presence of counsel, disparaging accused's counsel's competence, encouraging accused to discharge counsel and retain cooperative counsel chosen by the prosecution, threatening accused with harsher treatment at sentencing, to force her to cooperate and thereafter manipulating the Court in order to prevent full disclosure of such misconduct? No.

## IV. Counter-Statement Of The Case[1]

Respondent, Hazel Morrison, was charged with illegally distributing heroin. Before her trial she filed a Motion to Dismiss the Indictment based on a denial of her Sixth Amendment right to counsel and due process. The motion challenged the propriety of two interviews conducted by Federal Drug Enforcement Administration (DEA) agents on three consecutive days, ten days before trial. At the end of the hearing on the motion, the Respondent entered an open conditional guilty plea to one count of distribution. This, however, was contingent on appealing the denial of her aforesaid motion to the Third Circuit Court of Appeals.

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[1] There is no dispute regarding the facts of this case as contained in the Appendix filed by the Respondent in the lower court. The Court should be aware of the history of the Joint Appendix filed by the government as disclosed in correspondence to the Solicitor General, via his assistant, dated July 17, 1980, July 25, 1980 (Assistant Solicitor attempts to aver that the Clerk suggested a waiver of printing forty copies), and to the clerk of this Court dated October 1, 1980, which is incorporated herein by reference.

For her first conviction on October 10, 1978, the Respondent was sentenced to five years imprisonment with an additional special parole term of three years to follow.

The Third Circuit unanimously reversed the trial judge and dismissed the indictment with prejudice. A Petition for Reharing was denied by all the judges who participated in the decision, as well as a majority of the Circuit Judges in regular active service. One judge wrote a dissent, joined by a second. A third voted for rehearing because of the importance of the issue and a new opinion in *U.S.* v. *Broward,* 594 F.2d 345 (2d Cir. 1979), *cert. den.* _____ U.S. _____ (1979).

Dissatisfied with this sanction adjudicated by the Third Circuit for the misbehavior of government agents, the Solicitor General filed a Petition for Writ of Certiorari. The petition was granted on June 30, 1980.

The Respondent's Counter-Statement of Facts is as follows:

After the defendant was indicted, she retained private defense counsel, Salvatore J. Cucinotta, Esquire. For the purpose of pretrial negotiations and discovery, defense counsel, Salvatore J. Cucinotta, Esquire, met with Assistant United States Attorney John E. Riley and DEA agent Dennis Malloy on May 31, 1978 (A. 121a).[2]

After May 31, 1978, another DEA agent, Stephen Hopson, contacted agent Malloy for the purpose of interviewing Ms. Morrison and returning the personal property found in Respondent's automobile (A. 122a), without advising the Assistant United States Attorney or defense counsel. Agent Malloy knew that Hopson wanted "to solicit her [the accused's] cooperation in his particular investigation," and that Hopson would "negotiate" directly with the accused (Id.). To assist in his negotiations, agent Hopson discussed the pending charges "generally" with Malloy (A. 124a). He examined Malloy's file (A. 36a), which directly related to her impending September 5, 1978, trial and determined who the trial judge would be (A. 124a). Agent Hopson also spoke to Assistant United States Attorney John E. Riley, the Government's trial counsel, before negotiating with the Respondent [alone in her home] (A. 37a).

By August 11, 1978, Assistant United States Attorney G. Daniel McCarthy replaced Riley as the Government's trial counsel. On Wednesday, August 23, 1978, DEA agents Hopson and Bradley, unknown to defense counsel, went to the Respondent's home (A. 8a). Greeted by the Respondent's children, the agents obtained entry into the Respondent's home:

> BY MR. CUCINOTTA:
>
> Otis, [Morrison, Respondent's fourteen year old son] I want to direct your attention to Wednesday, August 23, 1978, the first time that you saw Agents Hopson and Bradley, and tell the good Court what you told me about what happened.

THE WITNESS:

Well, they came to my house. It was between 12 and 1 and — . . . They identified theirselves as police officers, so I went upstairs and got my mother. My brother, Michael, let them in.

My mon came downstairs and she — she — they told her that they was the — state, federal and state.

So they asked her could they sit in the dining room. They went to the dining room [A. 164a].

I went out. I went upstairs, sat on the steps, on about the fifth step, and steps is over — you could hear on the steps into the dining room and I overheard them.

They was talking and they was telling my mother . . . [A. 165a].

And one, the officer — . . . .

Well, the officer, he said that — asked my mother to help "her" out to find somebody, some person, so — and they was telling her that they could get her a new home, a job, and — and she said she didn't have nothing to say, and so he said, "Think about your kids. Who will take care of all your kids while you are doing time?"

He was telling my mother to think about the kids; and so — and he said, "We know your attorney. All he wanted was your money. He's a asshole." . . .

Her attorney, her lawyer. So they said, "If you go to court and you and your attorney will be assholes." [A. 166a].

> THE COURT: So that you understood what they said was that the only reason that Mr. Cucinotta wanted to take this to court was so that he could get money?
>
> Is that what you understood?
>
> THE WITNESS: Yes.
>
> THE COURT: All right.
>
> Go ahead.
>
> THE WITNESS: So then my mother, she didn't say nothing, only — and then they asked her —
>
> THE COURT: You are dropping your voice, Otis.
>
> Please bear this in mind. This is important.
>
> THE WITNESS: She — she said she didn't have nothing to say to them. That's what she said, so —
>
> THE COURT: All right. [A. 167a].

And,

> BY MR. MC CARTHY: [to Respondent]
>
> Q You invited them into your home.
>
> A No — they were already in my home. They were in my livingroom when I came downstairs. [A. 145a].

Agent Hopson told Respondent that he wanted to discuss the pending charges against her and how he could help her with regard to her case (A. 127a and 146a). Agent Bradley said:

> [t]here was two boundary lines that we could work in. We could recommend through the United States

> Attorney's Office [to the judge] that . . . she would get a stiff jail sentence or we could recommend . . . that the case could possibly be dismissed. . . . [A. 110a].

Finding Ms. Morrison uneffected by their overtures, the agents attempted to subvert her confidence in her lawyer and the adversary system. Hopson stated: "Your lawyer is going to make a asshole out of hisself and you, too, in the courtroom. . . . [i]f you decide to fight your case. . . ." (A. 127a. See also A. 166a, 170a and 175a). She then was questioned as to the sourse of her heroin in April and May of 1977 (A. 148a), the subject of her upcoming trial.

Resisting these inquiries, the agent reminded her that she was going to trial before the worst "son of a bitch" trial judge in the federal system (A. 128a) while the only thing her attorney was interested in was his fee (A. 128a, 166a and 167a), and not whether she would win her case (A. 176a).

Unfurling their next stratagem, the agents promised Respondent a job and another place to live if she cooperated with them (A. 175a) and not her lawyer. The agents played upon Ms. Morrison's emotional and maternal ties to her children, asking her to consider the fate of her children if she failed to cooperate and was incarcerated:

> BY MR. CUCINOTTA: [to Portia McDuffie-Respondent's seventeen year old sister]
>
> Q What did you hear?

A I heard him say — well, this the first words: I heard him say, "Well, your lawyer is an asshole," like that, "and if you cooperate with us that we could help you."

And the two — one of the — one of the officers was talking — I didn't know which one it was because I didn't see him when they came, when they arrived, when they came into the house — but one of the officers said, "If you help us then we can help you; we would give you a job and give you somewhere else, another place to live."

And she answered — she didn't say anything. It was like, you know, she ain't want to say. You know, she ain't want to cooperate.

So one of them said, "Well, think about your [A. 175a] children; think about what would happen to your kids if they didn't have a mother around the house.

And she still wasn't saying — she still wasn't giving them information that they wanted.

Q Did they use any other words to describe me?

A No.

I just remember hearing them say that you was an asshole.

Q Now, did they talk about money at all, if you recall?

A I don't recall them talking about that.

Q Did they talk about me receiving a fee?

A They said all that you wanted was the money; you wasn't really interested in whether she wins her case. [A. 172a to 176a].

Hopson then handed her a piece of paper with his phone number if she decided to change her mind and save herself (A. 129a).

> . . . [t]wo officers approached my home but I was in bed and my son answered the door, my oldest son, and he came upstairs and told me that two police officers was downstairs in my living room.
>
> I put on my robe and I came downstairs and the two officers identified theirselves as federal agents and asked me could they talk with me and I told them yes and that they could have a seat in my dining room; and we sat in the dining room and he asked me — he told me the reasons that he was at my [A. 126a] house, about my case, but he really wanted to know about an individual that he said other people have informed him that I was associated with.
>
> I told him I had nothing to say, so he told me then it was — he asked me was I represented by a public defender or private attorney.
>
> I told him I was represented by a private attorney.
>
> Then he stated, "Well, I know your attorney," and he called your name — Cucinotta.
>
> He told me if I cooperated with him he could help me, my lawyers couldn't do anything for me, and he also told me — he said, "If you decide to fight your case, your lawyer is going to make a asshole out of hisself and you, too, in the courtroom."
>
> So I asked — I told him I didn't have anything to say and he asked me did I know the judge that I was going under and I said yes.

So he said, "Well, all I want to know is, do you know the individual that I am speaking about?"

And I told him, "Yes; I do. I know a lot of people."

So he asked me — well, I think I better not say that. I don't know.

Q Do you want to spell it? [A. 127a].

A No.

He said that I was going underneath the worst SOB in the federal courtroom.

Q Well, what else did he say?

A I asked him what was a SOB. He said, "A son of a bitch."

Q Go on.

A So the other officer, Bradley, whatever his — he left my house — I mean, well, he left out of my house and went on the front porch, so Stephen Hopson wrote his name and his phone number on a piece of paper and told me — he said, "Well, if you decide to change your mind, give me a call. This is where you can reach me." The number 597-8347.

Q Did he have an opportunity to discuss the moneys that you were paying me?

A The money was — the only thing was discussed about the money was the fact that, "Your attorney, all he want was your money." No amount was made — I mean, was spoke about.

Q But what did he say about what I wanted?

A All the attorney wanted was the money that you was given but no amount; he — he made no particular amount to me that I can recall of [A. 128a].

In the presence of counsel and his investigator, Respondent called agent Hopson and tape recorded her side of the conversation,[3] stating:

> I'm calling you back because I was thinking about about what you was talking about. I want to know, what do I really have to do, since my lawyer can't help me? I mean what I'm trying to find out is, the person that you named, that's the only thing that you want me to do? Between 12:00 and 1:00 o'clock, you'll be . . . all right. Think it over [?], I did, well I thought it over when you left, when you got to talking about my kids. . . . [G-2 Trial Exhibit, A. 15a].

Plans were made to meet the agents again between 12:00 and 1:00 P.M. on the next day because Ms. Morrison wanted the investigator, Rus Kolins, retained on her behalf by counsel, "to be at my house to hear some of the things that Steve Hopson was saying to me because I felt like *my word wouldn't go far in a courtroom against an agent,* a Government agent." (Emphasis Supplied, A. 142a).

On Thursday, August 24, 1978, agents Hopson and Bradley arrived between 5:00 and 6:00 P.M. instead at the pre-arranged time (A. 140a). They were greeted by the Respondent's son, Otis Morrison, Jr.

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[3] Although the Government taped phone conversations of Ms. Morrison to prove the criminal charges, she could not tape the conversation of the DEA agents to prove their outrageous behavior without violating Pennsylvania's wiretapping law. 18 C.P.S.A. §5701 *et seq.*

Ms. Morrison's son, Otis, testified that:

> . . . [t]he next day they had come. I — I walked up on the porch and the officer asked me was my mother home.
>
> So I — I told him no.
>
> I said, "I got to go — I have to go see," because I hadn't stepped in the house yet.
>
> As I stepped in the house he tried to follow me in; so I closed the door and I told him, "I am going to see if my mother home."
>
> I went and told my mother.
>
> So while I was going to tell my mother, he was knocking on the door and he was pushing the door trying to come in, so — and I went back to the door before I got to tell my mother, and so I said, "I am going to tell my mother now."
>
> He stuck his foot in the door and tried to push the door open.
>
> He was tell me, "Let — well, let me come in until you get you mother."
>
> And so my bi[g] sister came to the door and she looked out there and who was it, see who it was, and so she ran back in and told my mom while I locked the door and that is when my mom came to the door and told him we had company.[A. 168-9a].

The Respondent told them that she wanted her attorney present (A. 158a). They left.

On Friday, August 25, 1978, the Respondent was unexpectedly visited a third time, after the agents learned

that her counsel was out of town (A. 30a). The Respondent testified on direct that:

> A Him and Agent Bradley came back to my house and they came and two — a friend of mine and my father was there. Mr. Stephen Hopson asked both of them to leave because he would like to speak with me privately.
>
> Q Did you expect him at that particular time?
>
> A Well, I got a phone call but the phone call that I received was about 9 o'clock that morning, but it was — the phone call wasn't — he didn't say his name was Stephen Hopson or he didn't say his name was Bradley.
>
> He said his name was Russ ". . . and we will be there about 10 o'clock."
>
> So I thought it was the investigator, so I made a phone call to him and he told me he had never called me.
>
> So I gathered then it could only be the other two [A. 141a Hopson and Bradley] and before I could get myself together they both was at my door.
>
> So I let them in and. . . .
>
> That was when Stephen Hopson told me that he was on investigation with another party that I was associated with again and that is when he told me that the type of deal that he could make for me.
>
> So I told him I didn't have anything to say because I was under the impression that I would talk with him *in the presence of my attorney.*

So he said, "Well, you called us and told us to come back here and *we don't need your attorney because your attorney can't do anything until you decide to agree with us,* and he said, "*the only way that the U.S. Attorney is going to hear anything that you have to say, you have to make an agreement to cooperate with us.*"

So I said, "Well, I don't have anything to say [Emphasis Supplied, A. 142a] you until I am in the presence of my attorney."

Q What did he say?

A So he said, "Well, you know, we don't — we are not — we are just wasting our time to keep coming backwards and forth out here if you are not going to cooperate." He said, "I am telling you, if you cooperate with me one hundred percent," he said, "and I will be with you one hundred percent," he said, "but if you don't cooperate with me, I will be against you one hundred percent," he said, "because I am going to bust my ass,". . . .

Q What did he say about me? [Mr. Cucinotta, Esquire]

A Well, the only thing he said about you at that particular time was the fact that he knew that who Sal Cucinotta was and that Sal Cucinotta could not present anything to the U.S. Attorney until I have made an agreement to cooperate with them.

Q Did he tell you what I was interested in again?

A I don't remember him telling me anything about interested in money again.

Q Is that the extent of the contact you had with him on Friday?

A No. Jim Bradley, that is when he said to me he could offer me two things.

I can't exactly recall what he said, but he did [A. 143a] say that he could help me in according to the two things that he was speaking about, and all he wanted to know was the fact is this where I received my heroin from, the individual's name that they spoke about, and I told him his — "I just don't have anything to say to you."

So he got a little —

Jim Bradley, well, he walked — he got up and he left.

He said — well, like he was finished with it.

So Stephen Hopson stood there and he — at my dining-room table and closed his book and he said, "You know, it is going to me your gooddamn ass that is going to jail," he says, "and I am going to bust my ass to get the other individual." He called his name.

So I told him — I said, "I still don't have anything to say because I am not in the presence of my attorney," and that is when he called it back to my attention to the judge that I was going under.

Q Go on, then.

A He said, "He hate black people."

Q Uh-huh. And then what happened?

A I told him I still don't have anything to say.

So he snatched his book up and he left.

Q What did he say he was going to do to me? [A. 144a].

A Yes. He did make a statement that I was going to wait until the last minute to cooperate with them and have you to call them and then he was going to "fango" you, whatever that means.

Q And where was your attorney that day?

A In Pittsburgh [A. 145a].

On August 30, 1978, the Respondent filed a Motion to Dismiss the Indictment with Prejudice requesting a dismissal of the charges against her on the grounds the aforesaid conduct of the DEA agents constituted an interference with her Sixth Amendment right to counsel and a denial of due process. The Government's Memorandum in response admitted "without advising defense counsel, the Government during the aforesaid week (August 23, 1978) attempted to induce the defendant to become an informant and to cooperate with the Federal Agents in their on-going investigation of traffic in narcotics" (A. 72a). However, the Government when answering said motion: (1) denied that the agents sought to learn where the Respondent's heroin supply came from in April or May of 1977 (Answer to Defendant's Motion to Dismiss the Indictment with Prejudice, paragraph #7, A. 6a); (2) indicated that the "agents specifically advised the defendant that they did *not* want to talk about her outstanding case," (Emphasis Supplied, *Id.*); and, (3) denied that the effectiveness of defendant's trial counsel was ever discussed between the agents and the Respondent. (Paragraph #9, A. 7a). Items

one through three would later be recanted by the agents, but only after they manipulated the trial court into discovering whether their conversations were tape recorded.

On August 31, 1978, Respondent entered into an agreement with the Government whereby she would waive all her pretrial motions, jury selection and trial rights and enter a plea to one count of the indictment as long as she could have a hearing on her Motion to Dismiss which could be appealed to the Third Circuit Court of Appeals if denied by the trial judge.[4]

On September 5, 1978, defense counsel and Respondent appeared in court ready for a hearing on the dismissal motion, along with a cassette tape recorder and three tapes, two of which were labeled "HOPKINS - PHONE" and "HOPKINS - AUG. 25" (sic). The tapes were placed on the defense table along with his file, folders and notes. Defense counsel expected to utilize a third tape containing the one-sided phone call of Ms. Morrison and transcription of same during the hearing on the motion (Trial Exhibit G-2, A. 15a, and Trial Exhibit G-3, a cassette tape). Noticing the labeled tapes and recorder, the Government's first witness, DEA agent Hopson, advised the Assistant United States Attorney G. Daniel McCarthy that "he believed that the tape recordings resulted from illegal wiretapping and eavesdropping." (See Affidavit of Probable Cause for War-

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[4] Use of the conditional guilty plea was condoned in *United States* v. *Zudick*, 523 F.2d 848 (3d Cir. 1975).

rant #36688 for "conversations between Special Agent Steven Hopson and Hazel Morrison," at A. 13a-14a).

When agent Hopson took the stand, he had difficulty recalling what transpired between him and the Respondent at her home. He was generally unsure, if he was not "mistaken" in his recollection (A. 35a). For example, in the first twenty-one pages of his testimony, he could not recall or equivocated his answers as to over ten questions. Agent Hopson took the stand and testified, *inter alia:*

> Q [By Mr. McCarthy] Did you ask her anything about her case?
>
> A Definitely not [A. 26a].
>
> * * *
>
> Q Did you say anything about that case?
>
> A Not that I recall. . . .
>
> Q Did she discuss with you anything about her case?
>
> A No sir [A. 28a].
>
> * * *
>
> Q In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?
>
> A Not that I recall [A. 30a].
>
> * * *

But later, the agent would "recall" and contradict his previous testimony:

> Q Did you at any time during these three contacts with Mrs. Morrison discuss with her anything about this case?
>
> A No sir, not specifically [A. 31a].

The agent admitted that he was attempting to acquire an "off-the-record offer" of what she could do (A. 32a) without the knowledge of her attorney. However:

> Q In that telephone conversation on August 23 in the late afternoon, did you discuss her case with her at that time?
>
> MR. CUCINOTTA: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: Not that I recall [*Id.*].

Believing his conversations with the Respondent were recorded, during cross-examination Hopson testified that the original Assistant United States Attorney assigned, Mr. Riley, "may have" spoken to him on several occasions regarding Hazel Morrison (A. 34a), but that he could not "recall exactly" (*Id.*). He said he did not need any additional information to assist his investigation from Agent Dennis Malloy; that he was aware of the charges against her before going to see her (A. 39a); and that he wanted to "help her" with respect to those charges (A. 41a). However, agent Hopson was otherwise

"unsure" or "vague" in his recollection. For example:

> Q [S. Hopson — cross] What did you say about the Marshal Protection Program to Hazel Morrison?
>
> A I really don't recall. . . .
>
> Q Did you have an opportunity to explain to her her present predicament in terms of coming to trial?
>
> A I really don't understand your question [A. 42a].

To assist the agent's faulty memory, a transcript was handed to the prosecutor. The prosecutor asked for a side bar and stated:

> Mr. Cucinotta has just handed me a transcript which I believe purports to be a transcript of a telephone conversation which was apparently recorded by the defendant.
>
> That being the case, it is my understanding that the defense is going to try to attempt to impeach this witness.
>
> Any recording made in the State of Pennsylvania by a private individual is a violation of state law, Section 5702, if made over a telephone wire, and Section 5706, if made in, say, for instance, a person's home.
>
> It is the Government's intention to request the Court that the tapes that are on Mr. Cucinotta's counsel table and the recording device be retained by the court for possible use in a state prosecution.
>
> The particular section here, Subsection (c)(1), [A. 46a], states that no use shall be made of any recording pursuant to this subsection including, but not

limited to, direct or indirect use in any court or administrative proceeding.

Whoever made that recording faces a possible two-to-three year jail term under the Pennsylvania code.

As well, Your Honor, the decision of the United States versus Starks requires that before any recording be offered into evidence that a foundation be laid.

No foundation has been laid for this recording.

MR. CUCINOTTA: Your Honor, my sole attempt at this point is to see if this transcription will refresh the memory of the agent so that he may more accurately describe the phone conversation that he had with Hazel Morrison on that particular day, number one.

Number two, Your Honor, this information is not illegal. It is not a violation of state law; nor is it a violation of federal law. It is a violation of neither federal nor state law at this point only because, specifically, this is merely a transcription of one —

Your Honor, *the witness is overhearing the conversation. I would ask that he be able to sit down.*

THE COURT: No; he can not hear you. I can barely hear you myself. Go ahead. [Emphasis Supplied, A. 47a].

Although the trial court stated the witness could not hear the conversation, a subsequent search warrant for defense counsel's files, briefcase, (A. 77a), tapes and tape recorder averred that the agent reported that

defense counsel became nervous when quested at side bar.[5]

Defense counsel renewed his argument for permission to use G-2 to refresh the agent's memory:

> MR. CUCINOTTA: It is that one side-Your Honor-[A. 47a] or, it is only the recording of — it is a transcription of only the defendant's voice. It has nothing to do with what — there was no wire interception whatsoever.

---

[5] *AFFIDAVIT OF PROBABLE CAUSE FOR WARRANT #36688*

On September 5, 1978, information was received from S/A Stephen Hopson, DEA, that he believes that tape recordings that resulted from illegal wiretapping and eavesdropping were possessed by Salvatore J. Cucinotta, Esquire, and turned over to the U.S. District Court on 9/5/78.

S/A Hopson stated that on 9/5/78, he observed two audio cassette tapes on the defense table in *U.S.* v. *Hazel Morrison*, CR 78-193, in which Mr. Cucinotta was defense counsel. The marking on these tapes included the S/A's name and some dates. He immediately brought this to the attention of Assistant U.S. Attorney Daniel McCarthy, the prosecutor in the case.

A short time later, Assistant U.S. Attorney McCarthy asked Cucinotta what the tapes. Cucinotta replied that he had all of S/A Hopson's conversations with Hazel Morrison on tape. McCarthy advised Cucinotta that "if these tapes are what you say they are, then they are an illegal intercept."

Later, during the Court proceedings, Cucinotta had a transcript marked and appeared to be relying on the transcript in his questioning. At that point, Judge Hannum, who was presiding, questioned the nature of the recordings and the transcript. Cucinotta explained that they were recordings of only one side of the

THE COURT: Where did you obtain this so-called copy of a transcription?

MR. CUCINOTTA: Your Honor, I was — I was present when the call was made. It is exactly what she said on the phone and that is all.

MR. McCARTHY: So that a recording was made; is that correct?

MR. CUCINOTTA: Yes, but it is not — it is not illegal.

THE COURT: The statute here sayd it is.

MR. CUCINOTTA: Nothing was intercepted.

MR. McCARTHY: Your Honor, I have the statute for the Court. I would like to read it.

---

conversation, that of his client, S/A Hopson reported that Cucinotta became visibly nervous and evasive at the questioning of Judge Hannum. Later, Cucinotta told McCarthy and Hopson that it was better for his client to take a two year state sentence (for eavesdropping) than a 15 year federal sentence (for narcotics).

Thereafter, Judge Hannum's Courtroom Deputy Mattie Hooker, received custody of the transcript and cassette recordings as well as the cassette recorder.

The conversations between Hopson and Hazel Morrison included both telephonic and in person conversations. S/A Hopson did not consent to any interception or recording of his conversations nor did he consent to divulging same.

The pertinent facts stated above have been verified by Assistant U.S. Attorney Daniel McCarthy.

Your affiant believes that the information contained herein is reliable and makes out probable cause for this warrant for evidence of Breach of Privacy under 18 C.P.S.A. §5702 and 5704.

(A. 13a-14a).

MR. CUCINOTTA: It is a state statute.

THE COURT: Well, I am aware of it.

MR. CUCINOTTA: It is only one, Your Honor. It is only one side of a conversation. It doesn't even contain his conversation.

It is as if I wrote down the words on a pad as you said them over the phone and that is all.

MR. McCARTHY: If I may read the pertinent portion of the statute: [A. 48a]. . . .

MR. CUCINOTTA: There is no interception here. I am sorry; excuse me. . . .

MR. McCARTHY: You have intercepted. You have recorded that conversation.

MR. CUCINOTTA: No; I did not.

MR. McCARTHY: The law specifically covers that.

MR. CUCINOTTA: No; I did not.

THE COURT: Please let him finish.

MR. CUCINOTTA: Yes, sir. . . . [A. 49a].

THE COURT: We are at a posture now where there is a conversation, I assume, that Mr. Cucinotta is going to ask about on cross-examination; and is it your intention to utilize this sheet, which is G-2, to question this witness about something he presumably said to Mrs. Morrison over the telephone? Is that your intention?

MR. CUCINOTTA: Yes, Your Honor. My intention is to see if this here would refresh his recollection.

THE COURT: In order to do that it will be without reaching the point as to the validity of this.

We would first require a validation of the transcript.

Who made this?

MR. CUCINOTTA: I am not introducing it into evidence. . . .

THE COURT: Who made it? . . .

THE COURT: Who typed this up?

MR. CUCINOTTA: Your Honor, if the Court please, I am not prepared at this point to tell you. [A. 50a].

THE COURT: I asked you who typed it up.

MR. CUCINOTTA: I don't know. I was given that by one of my — by an investigator.

THE COURT: Well, how did you get hold of it?

MR. CUCINOTTA: Your Honor —

THE COURT: I asked you who typed it up.

MR. CUCINOTTA: All right. Your Honor, I am not — I am not prepared to answer that question. All I am telling you —

THE COURT: Well, if that is your answer, we will proceed. You are saying you are not prepared to tell me who typed it up.

MR. CUCINOTTA: I don't even know who typed it up, Your Honor.

THE COURT: You may be seated. Proceed.

MR. CUCINOTTA: May I — may I question the witness with that?

THE COURT: I asked you a question as an officer of the court.

MR. CUCINOTTA: As an officer of the court, Your Honor, it was the — it was the secretary of my investigator who typed [A. 51a] it up.

THE COURT: Whose name is what?

MR. CUCINOTTA: I don't know.

THE COURT: All right. We will proceed.

You ask your question, and if there is any objection, we will rule on it.

This is your sheet.

MR. CUCINOTTA: Thank you.

(End at side bar).

THE COURT: Ask your question, please.

MR. CUCINOTTA: Yes, Your Honor.

BY MR. CUCINOTTA:

Q Mr. Hopson, do you recall when Hazel Morrison called you on the phone she said, "I am calling you back because I was thinking . . ."?

THE COURT: You are reading from something?

MR. CUCINOTTA: It is a question, Your Honor.

THE COURT: I say: You are reading from something?

MR. CUCINOTTA: Yes, Your Honor.

THE COURT: What are you reading from?

MR. CUCINOTTA: I am reading from a piece of paper which I had hoped to have — to assist in the

agent's recall so that he will be able to tell us in detail as to what he heard [A. 52a] from Hazel Morrison on that particular day.

THE COURT: All right.

The first thing will be to validate that from which you are reading.

BY MR. CUCINOTTA:

Q Mr. Hopson, tell me —

THE COURT: I say the first thing is that you will validate that from which you are reading.

MR. CUCINOTTA: Yes, Your Honor. I was going to validate it through this witness.

THE COURT: How are you going to do it?

MR. CUCINOTTA: I was going to ask him as to whether or not this is what he heard her say.

THE COURT: What is your view, Mr. McCarthy?

MR. McCARTHY: Your Honor, I object to that procedure. Counsel is attempting to rely upon a transcript of an illegal recording. . . . The Government would request that that recording [A. 53a] equipment be seized and held by the court for possible state investigation and the Government would request before any use be made of either that recording or that transcript that the defendant in this case comply with the requirements of United States versus Starks for the admissibility of the tape recording. . . . [A. 54a].

MR. CUCINOTTA: . . . I am attempting to . . . refresh this witness's memory with respect to some of the exact statements that I know that purportedly he heard over the phone.

THE COURT: You say you know. Is that your testimony?

MR. CUCINOTTA: I was present when the phone call was made.

THE COURT: Are you testifying?

MR. CUCINOTTA: No, Your Honor.

THE COURT: All right. Go ahead.

BY MR. CUCINOTTA:

Q Do you recall, Agent Hopson, whether or not —

THE COURT: Now, just a moment.

You are addressing the Court.

Have you concluded your address to the Court with respect to Mr. McCarthy's position?

Either you have or you have not.

MR. CUCINOTTA: I have not, Your Honor.

THE COURT: All right. Proceed, then. [A. 56a].

MR. CUCINOTTA: . . . Part of the evidence is tape recordings which were consensually utilized to convict her; yet in the same position she may not be able to do exactly what the agents did in this particular case; that is why she did not do what the agents did in this particular case, because for her to do it would be illegal, and that is the status of the law, and for the agent to do it, have the informant bug her phone, that is OK; so we didn't do what the agents can lawfully do, and I think that that is an ironic turn of events. . . . [A. 57a].

THE COURT: Stop making a speech and stick to the law, if you will, please.

Is that your representation to the Court?

MR. CUCINOTTA: Yes, Your Honor.

THE COURT: All right. *The objection is sustained.*

MR. CUCINOTTA: Your Honor, I would like permission to mark this piece of evidence.

THE COURT: Do it without a speech. . . . [Emphasis Supplied, A. 58a].

Hopson testified that the defendant called him to have him repeat how he could help her more than her attorney (A. 58a). Seeing her a second time, he discussed the likelihood of her winning the case (A. 64a), and that she could receive a severe sentence, if she did not cooperate (A. 62a).

The Government continued to attempt to discover what was contained on the tapes on defense counsel's desk (A. 64a) seized by the Court under protest (A. 65a) before any agents continued to testify.

MR. McCARTHY: Your Honor, I would request that the tapes and the recording equipment be left in the possession of the court.

THE COURT: All right. They may be.

MR. McCARTHY: Thank you.

THE COURT: They will be given to Miss Hooker and she will retain them.

I say they will be given to Miss Hooker and you [A. 64a] can do that right now, Mr. Cucinotta.

I say you can do that right now, Mr. Cucinotta.

Give them to Miss Hooker.

MR. CUCINOTTA: I object, Your Honor.

I do believe that this amounts to a —

THE COURT: I say give them to Miss Hooker as the Court has directed you.

MR. CUCINOTTA: We will submit them to Miss Hooker under your direction.

THE COURT: I beg your pardon?

MR. CUCINOTTA: Under your direction I am submitting them to the Court.

THE COURT: No further comment is invited [A. 65a].

After a recess, the Court directed defense counsel to obtain a lawyer for himself (A. 66a). Defense counsel advised the Court of a federal case also indicating that G-2 was *not* illegal. (*Id.*). Still, the Government warned counsel of his *Miranda* rights (A. 67a-68a), and the Assistant United States Attorney agreed that it would be necessary to listen to the tapes to determine whether or not the conversations of agents Bradley and Hopson were recorded (A. 68a). Defense counsel's opportunity to respond to the Government's position was interrupted by the trial court who admonished counsel to "stop right there" (A. 69a). Notwithstanding the Court's admonishment, defense counsel stated for the record:

> [T]here has been a confiscation, actually a seizure, of a tape recorder and two tapes that were on my desk [A. 70a]. *How the United States Attorney figures that they were relevant, I don't understand, but it was actually seized.* [Emphasis Supplied, A. 71a].

The Assistant United States Attorney then represented to the Court that he had "probable cause and a reasonable basis to believe that the contents of those tapes" violated Pennsylvania law (A. 71a), when only minutes before he believed "that there is a possible violation of state law (A. 68a). "That is inaccurate" defense counsel advised the Court (A. 71a); yet, the prosecutor continued his efforts to discover what was contained in the confiscated tapes because "Mr. Cucinotta is unwilling to tell us whether or not the agent's voice is on those tapes . . . ," despite counsel's position that what was confiscated was "irrelevant" (A. 77a).

The Court recessed and would not resume until the local prosecutor arrived with a search warrant (A. 73a-77a) because:

> THE COURT: This tape and apparatus is in the custody of Miss Hooker. It seems to me that it should so remain.
>
> What is your view on that, Mr. Cucinotta?
>
> MR. CUCINOTTA: Your Honor, I think that defendant's Sixth Amendment right to counsel is being intimidated, threatened —
>
> THE COURT: There is nobody being intimidated, counsel; we are trying to afford you proper protections and that you should understand.
>
> MR. CUCINOTTA: Your Honor — Your Honor —
>
> THE COURT: Yes.
>
> MR. CUCINOTTA: May I continue?

THE COURT: Certainly. [A. 76a].

MR. CUCINOTTA: Your Honor, defendant is telling the Court that there is evidence that the Government has infringed upon her right to counsel.

Now, in terms of what has occurred at the hearing there is another demonstrable effect by the Government in terms of affecting her right to representation where her very attorney has had items from his files taken from him.

THE COURT: Well, we have not taken them. The matter was turned over to Miss Hooker, as you know.

MR. CUCINOTTA: Over my objection, Your Honor, as an officer of the court only, Your Honor, under protest, Your Honor, and I ask that they be returned. [A. 77a].

Members of the Philadelphia District Attorney's Office arrived with a signed search warrant in hand and were ready for execution of the warrant (A. 83a). They requested permission from the Court for immediate seizure of the tapes (A. 84a), which was denied (A. 85a).

The first day of testimony ended with the request that the stipulated sequestration of Government agents remain in force; and that the Government not be given access to the confiscated tapes overnight (A. 86a).

The next day, the Government filed a "Motion for the Release of Impounded Tapes and Recording Equipment" (A. 95a). Counsel for Mr. Cucinotta again advised the Court that no violation of law had occurred (*Id.*), but the Government continued its attempt to "be permit-

ted to listen to the tapes . . . so that we would not waste the time of the Court . . ." *before* continuing testimony (A. 96a).

When it was decided that the tapes would be heard *after* the hearing, testimony on the defense Motion to Dismiss continued with the unexpected recall of agent Hopson "in the interest of justice" (A. 102a). The day before agent Hopson testified, despite recall problems, that (1) he had contact with the Assistant United States Attorney in charge before contacting the defendant; and that (2) he told her, "similar to the first meeting," (A. 30a) to contact her lawyer. Retaking the stand, however, he was asked by the prosecutor:

> BY MR. McCARTHY:
>
> Q Mr. Hopson, yesterday afternoon under questioning from Mr. Cucinotta questions were asked concerning any representation that may have been made to Hazel Morrison. (A. 103a).
>
> In regard to those questions is there anything further that you recall concerning any representation that you may have made to Miss Morrison concerning her representation by counsel?
>
> A Yes, sir.
>
> Q Can you please explain those to the Court?
>
> A During one of the meetings that I had with Mrs. Morrison I explained to her and I questioned her as to if she had retained private counsel or if she had a public defender.
>
> I recall her response being that she had retained a private counsel and I questioned her.

I said — I asked her how much money she had paid him.

I think she said in the amount of $200 and she said she didn't pay him too much.

And I suggested to her also that if she was going to cooperate with the DEA it may be advisable for her to obtain a public defender, whereas she wouldn't have to pay any money to a private counsel; and I also suggested that I would let her think about what type of representation she may acquire for the amount of $200.

Q So you then did make comments concerning the representation by her counsel.

A Yes, sir.

Q Did you make any comments specifically concerning Mr. (A. 104a) Cucinotta?

A I don't recall.

I said that I was a case agent against Mr. Cucinotta in the past.

I don't recall any further representation. I may have; I may not have. (A. 105a).

Agent Bradley took the stand and stated that both he and Hopson knew who her lawyer was "at the first meeting. . . ." (A. 118a). He recalled the use of bad language in meeting with the defendant (A. 118a), as did the Respondent and her children.

Agent Dennis Malloy testified that he met the Respondent's attorney along with the Assistant United States Attorney as early as May of 1978 (A. 121a). He

recalled how agent Hopson wanted to talk to the Respondent. "*In the normal course* of working with the DEA, [Malloy] . . . expected that Agent Hopson would negotiate with . . ." the Respondent (A. 123a); and that Hopson knew who the defendant's attorney was (A. 124a); and that when he returned from the meetings with the defendant, Hopson reported that "nothing had transpired of use to *either* of us at that time" (Emphasis Supplied, A. 123a). It should be emphasized that at the conclusion of the hearing, the state and federal prosecutors listened to the confiscated tapes and concluded that no violation of law had occurred (A. 191a), as defense counsel had at all times contended.[6]

## SUMMARY OF ARGUMENT

The order of the Third Circuit Court of Appeals dismissing the indictment with prejudice is proper, necessary and just, as well as in conformity with all reported cases of similar prosecutional government misconduct. The facts set forth above are undisputed. The government intentionally, repeatedly and surreptitiously contacted the accused to induce her to abandon her defense and her counsel, and cooperate with the government through cooperative defense counsel to be chosen by the government. This process totally ignores and flaunts the historical, jurisprudential and democratic *raison d'etre* of criminal defense counsel and the adversary system, all of which will only be preserved by a dismissal of the charges.

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[6] The two tapes contained records of a Christmas party and a law school lecture (A. 193a).

## ARGUMENT

### A.

The Respondent submits that the charges against her must be dismissed with prejudice. No other remedy is adequate to rectify the government's disregard of our adversary system as held in *Commonwealth* v. *Manning*, 359 N.E.2d 51 (App. Ct. 1977), *rev.* 367 N.E.2d 635 (Mass. S. Ct. 1977); *People* v. *Mason*, 97 Misc.2d 706, 411 N.Y.S.2d 970 (1978). Any other result operates to her prejudice because if the charges are not dismissed, then the threats of the agents have a ring of credibility, i.e., should she have cooperated.

In *Manning, supra,* the defendant was charged with selling drugs to a DEA agent. On the eve of trial, August 22, 1974, DEA agent Marchand *merely telephoned* the defendant at work without the knowledge or permission of the defendant's attorney to " 'induce the defendant to become an informer'." *Id.*, 359 N.E.2d at 52. DEA agent Marchand also made several disparaging remarks about the defendant's counsel and the manner in which he was conducting the defense. Agent Marchand "indicated that the tactics of defense counsel would not insure the defendant being kept out of jail." *Id.*

The Appeals Court of Massachusetts reversed Manning's conviction and ordered a new trial, allowed new defense counsel to be paid for by the State, without regard to indigency. This, the Appeals Court felt, would cure what had happened.

Manning contended, as does your Respondent, that allowing for a new trial and free defense counsel would specifically permit the Government to circumvent due process and the Sixth Amendment right to counsel. For "[i]n all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel for his defense." *Powell* v. *Alabama,* 287 U.S. 45, 67-68 (1932).

Noting this contention in *Manning,* Justice Brown commented:

> I believe we should consider the implementation of a prophylactic rule in which the indictment against the defendant is dismissed where there was deliberate misconduct on the part of the law enforcement officers or prosecutors which interfered with the defendant's right to the effective assistance of counsel. Such a rule would likely have a stronger inhibiting effect on future police and prosecutorial conduct of this kind. [Citation omitted].
>
> The defendant may also have available to him a civil action against the D.E.A. agents alleging interference with the attorney-client relationship. [Citations omitted].

359 N.E.2d at 56.

Parenthetically, one notes that the Third Circuit treated a civil rights claim which captures part of Justice Brown's reasoning. In *Via* v. *Cliff,* 470 F.2d 271 (3d Cir. 1972), the plaintiff alleged that his consultations with his attorney while in jail awaiting trial had been deliberately obstructed and cut short by jail officials. The Court held that if the officials' interference was

either wrongfully motivated or without adequate justification, the plaintiff had established an infringement of his constitutional rights to counsel and need not additionally prove resultant prejudice. *Id.*, 470 F.2d at 275.

When the appellate decision in *Manning* was appealed to the Massachusetts Supreme Court, the Court agreed that no prejudice need be shown. The Supreme Court addressed the "sole issue of whether a new trial was the appropriate remedy for the constitutional violations found. . . ." *Commonwealth* v. *Manning*, 367 N.E.2d 635, 637(1977). The Court concluded that the indictments should be dismissed as to both counts with prejudice.[7] "The undisputed facts of the case show

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[7] Dismissal of the indictment is not a new remedy when dealing with Sixth Amendment violations, like the right to speedy trial. In *Strunk* v. *United States*, 412 U.S. 434, 37 L.Ed.2d 56 (1973), the opinion of the Court was written by Mr. Chief Justice Burger, who noted that the denial of a speedy trial is "unlike *some* of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges or compulsory service can ordinarily be cured by providing those guaranteed rights in a new trial." (Emphasis Supplied). There are other Sixth Amendment rights and due process rights like the right to a speedy trial and the right to counsel where the Court is used to deny same, where dismissal is the only remedy. To argue that dismissal should not be afforded because a "defendant who may be guilty of a serious crime will go free, without having been tried," *Strunk*, 37 L.Ed. at 61, quoting *Barker* v. *Wingo*, 407 U.S. 514, 522, 33 L.Ed.2d 101 (1972), is not novel especially when the public's interest in the integrity of the adversary system calls for dismissal. "[S]uch severe remedies are not unique in the application of constitutional standards." *Id.*

interference with Manning's constitutional right to counsel by two federal officers who worked closely with the state prosecutor." *Id.* Continuing, the Court said:

> As a general rule, "any violation of a constitutional right gives rise to presumptive prejudice, which normally requires a reversal of the conviction, in the absence of an affirmative showing by the Commonwealth that the error was harmless." [Citations omitted]. In the case now before us, we need not invoke a presumption of prejudice, as implicit in the motion judge's finding that there had been no "serious" impairment of the attorney-client relationship is a finding that the defendant had in fact been prejudiced to some extent. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U.S. 60, 76, 62 S. Ct. 457, 467, 86 L.Ed.2d 680 (1942). [Citations omitted]. *We think the application of the harmless error rule singularly inapposite here.*
>
> Further, we are of the opinion that the facts of the case demand that the indictment against the defendant be dismissed. We are confronted in this case not with the proverbial constable's blunder or even with good faith overzealousness in the pursuit of legitimate law enforcement aims. Rather, we have here a deliberate and intentional attack by government agents on the relationship between Manning and his counsel in a calculated attempt to coerce the defendant into abandoning his defense. While a balancing test may be appropriate in determining the proper scope of judicially created exclusionary rules, see, e.g., *United States* v. *Janis,* 428 U.S. 433,

454, 96 S. Ct. 3021, 49 L.Ed.2d 1046 (1976); *United States* v. *Calandra,* 414 U.S. 338, 94 S. Ct. 613, 38 L.Ed.2d 561 (1974), we do not think it the proper cause in the circumstances of this case. [Footnotes omitted].

This focus must be rather on the remedy necessary to cure the impairment. . . . [367 N.E.2d at 637] [T]he officers' misconduct was so pervasive as to preclude any confident assumption that proceedings at a new trial would be free of the taint.

Further, another trial, even if Manning is provided with counsel at public expense, may subject him to an *inexcusable risk of a more severe sentence were he reconvicted.* We think the grant of a new trial is of dubious, if any benefit to the defendant. *We also think that a stronger deterrent against the type of conduct demonstrated here is necessary.*

Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. The specific misconduct present in this case is particularly troublesome because only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts, and there is, in turn a grave danger that the courts themselves may become the instrumentality through which the government agents may effectuate threats to defendants regarding the consequences of asserting constitutional rights. [Emphasis Supplied, 367 N.E.2d at 638.].

In the case before the Court, there was clearly investigatory misconduct which was the subject and basis

of the Motion to Dismiss. Yet, the prosecution, without an adequate basis, sought to prevent its full disclosure by urging the Court to proceed harshly against defense counsel. The government initiated action and seized irrelevant tapes in the possession of defense counsel. Defense counsel was threatened by the Court with contempt and disciplinary action. This new, preventive and affirmative action of the prosecutor compounded the previous misconduct, depriving the defendant of her right to effective counsel of her choice. This fundamental violation of the defendant's Sixth Amendment right was sufficient to support and require the relief granted.

> THE COURT: . . . Mr. Cucinotta had put the Court on. In my view, this relates what did happen here.
>
> In putting the Court on, this was a matter that was frivolous, a sham, took up the time of a great many busy people, and I do not know what appropriate measure will suggest itself to the Court.
>
> It may be something in the nature of a contempt or a referral of this matter to the appropriate disciplinary board of the Third Circuit or the Philadelphia Bar Association. [A. 200a].

The government's action was clearly "a deliberate attempt to destroy the attorney-client relationship and to subvert the defendant's right to effective assistance of counsel and a fair trial," as found and stated by Circuit Judge James Hunter, III, of the Third Circuit in his opinion in this case which necessitated the dismissal of the indictment.

This was in accordance with the rationale in *Manning*:

> It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. . . . [367 N.E. 2d as 639].

In *People* v. *Moore*, 129 Cal. Rptr. 279, 57 Cal. App. 3d 437 (1976), after the defendant was arrested and unbeknownst to the defense counsel, "[A] beautiful investigator of the district attorney's investigation unit, Ms. Casey," contacted the defendant and told him that his attorney was inadequate; he began to cooperate. 129 Cal. Rptr. 279, 281. The *Moore* case cites a series of subsequent activities which could have occurred in *Manning* and in *Morrison* if the importunings of the DEA were successful. The Court wrote:

> The People claim Moore was not denied aid of counsel at a critical stage of criminal proceedings because no plea bargain was achieved, and their use of Moore was for purposes unrelated to his own case. The People overlook the offers and assurances the district attorney's office gave Moore as to his own case.
>
> [T]he meager benefits Moore received from his unaided bargaining, underscore the prejudicial effect of acting without counsel. . . . [129 Cal. Rptr. at 281].

At oral argument the People likened their intrusion into Moore's relationship with his attorney to a violation of the rights announced in *Miranda* v. *Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694. They argue Moore's remedy is to exclude from his trial any evidence gained by their acts in that regard.

This is not a case where the People have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of Miranda rights is tainted evidence, and the exclusionary rule is adequate to cope with the violation.

Here the People actively interfered with an attorney-client relationship established to defend Moore against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of Moore's right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is Moore's right to due process.

Due process is not a yardstick of definite value, but rather is an embodiment of the traditional notions of fair play and justice. (*Rochin* v. *People of California*, 342 U. S. 165, 72 S. Ct. 205, 96 L.Ed. 183). It is clearly violated when a defendant is denied counsel in criminal proceedings, (*People* v. *Mora*, 120 Cal. App.2d 896, 900, 262 P2d 594; *Gideon* v. *Wainright*, 372 U. S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799), but may also be denied under circumstances which do not include an outright refusal to provide counsel. [129 Cal. Rptr. at 282.]

The charges remained dismissed and the judgment of the trial court was affirmed.

In *People* v. *Mason*, 97 Misc.2d 706, 411 N.Y.S.2d 970 (Sup. Ct. 1978), the defendant was told to cooperate with the DEA. Defense counsel even complained to the Court, but the DEA persisted and indicated that the defendant's attorney was "young, inexperienced and clearly no match for" the prosecutor, 411 N.Y.S.2d at 973; the defendant subsequently became an informant based on promises of probation which the sentencing law disallowed. The charges were dismissed because of the violation of the Sixth Amendment.[8]

In sum, the reported cases that are on *all fours* with the case at bar resulted in a dismissal of the charges without a showing of prejudice. No prejudice need be shown because of the magnitude of the infringement of the right of counsel in this case. The Government intruded on this right without a waiver by Respondent. Regardless of whether or not the intrusions "were wholly unrelated to the criminal charges pending," *Moore, supra*, 129 Cal. Rptr. at 282, a waiver of counsel must

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[8] "If the Sixth Amendment right to the effective assistance of counsel means anything, it certainly means that it is the actual choice of the defendant which deserves consideration." *United States* v. *Seale*, 461 F.2d 345, 358 (7th Cir. 1972); accord, *United States* v. *Wisniewski*, 478 F.2d 274, 285 (2nd Cir. 1973), quoting *United States* v. *Sheiner*, 410 F.2d 337, 342 (2nd Cir.), 396 U.S. 825, 90 S. Ct. 68 (1969). See also, *Faretta* v. *California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L.Ed.2d 562 (1972) ("unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." 422 U.S. at 821).

be "an intentional relinquishment of a known right," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1939), and must be made "completely and intelligently," *Id.* at 468. Thus, in *Gallarelli* v. *United States*, 441 F.2d 1402 (3d Cir. 1971), the defendant's right to counsel was infringed at sentencing and the sentence was vacated. No prejudice need be shown. *See, e.g., United States ex rel Wagner* v. *Myers*, 234 F. Supp. 239 (E. D. Pa. 1964); *see also, Hamilton* v. *Alabama*, 368 U. S. 52, 157 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963); and *Strunk* v. *United States, supra*, note 6.

**B.**

The opinion of the Third Circuit Court of Appeals is in conformity with the law as exemplified in the decisions of cases involving similar but less egregious conduct.

In cases that do not involve wrongfully motivated attempts to subvert an accused's confidence in defense counsel, *e.g., Manning*; *supra, Mason, supra*; *Moore, supra*; nor intentional attempts to curtail attorney-client communications, *e.g., Via* v. *Cliff, supra*; but involve an undercover agent's discovery of attorney-client communications the decision of the Third Ciruit at bar finds additional support.

In *Weatherford* v. *Bursey*, 429 U. S. 545 (1977), Weatherford was an undercover agent who, with Bursey, was charged with vandalism. Both were arrested and at the invitation of Bursey, participated in pretrial defense discussions. None of the information gleaned by

Weatherford was transmitted to the prosecutor. After conviction, Bursey filed suit under 42 U.S.C. §1983 against the agent and his superior for denial of his Sixth Amendment right to counsel. The question for the Court was whether a denial occurred. This Court found none, because no information was communicated to the prosecution. 429 U. S. at 556. Had communication occurred, a conviction can be dismissed. *E.g., United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978); *United States* v. *Peters*, 468 F. Supp. 364 (S.D. Fla 1979); *Mastrain* v. *McManus*, 554 F.2d 813, 821 (8th Cir. 1977); *United States* v. *Orman*, 417 F. Supp. 1126 (D. Colo. 1976) (involving DEA interception of attorney-client communications.)

In *Weatherford*, dissenting Justices Marshall and Brennan believed the record supported a denial of the Sixth Amendment and a cuase of action under §1983. The language they used is, however, enlightening because the record now before the Court is even more egregious:

> [Even] . . . what occurred here [was] "the obvious thing in its mildest and least repulsive form . . . illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L.Ed. 746, 6 S. Ct. 524 (1886). I cannot join in providing even the narrowest of openings to the practice of spying upon attorney-client communications. There are actually two independent constitutional values that are jeopardized by governmental intrusions into private communications bet-

> ween defendants and their lawyers. First, the *integrity of the adversary system and the fairness of trials is undermined.* . . . [Emphasis Supplied].

*Weatherford* v. *Bursey*, 429 U. S. 545, 562 (1977).

In an earlier case, also involving attorney-client communication discovery, the Second Circuit Court of Appeals wrote:

> When conduct of a Government agent touches upon a relationship between a criminal defendant and his attorney, such conduct exposes the Government to the risk of a fatal intrusion and must be accordingly carefully scrutinized. . . . The *per se* rule represents a moral as well as a legal condemnation of such egregious and unequivocal conduct for which sanctions are imposed against the Government as punishment regardless of the defendant's guilt. . . .
>
> [I]f circumstances warranted it we would shrink from such a result. *United States* v. *Rosner*, [485 F.2d 1213, 1288 (2d Cir. 1973)].

*United States* v. *Gardner*, 518 F.2d 633, 623 (2d Cir. 1975).

*United States* v. *Acosta*, 526 F.2d 670 (5th Cir. 1976), *cert. den.* 426 U. S. 920 (1976), did not involve a surruptitious and conscious effort to subvert and destroy the right to counsel and the adversary system; however, the language supports the decision of the Third Circuit in *Morrison*. In *Acosta*, the prosecution and the testifying informant managed, to, *inter alia*, cover-up the deal the informant had with the prosecutor and the informant's criminal record until defense cross-examination.

The trial court dismissed the charges after the conviction because of "outrageous" conduct of the DEA. The Circuit Court reversed the trial court because the suppression by the prosecution had no "impact on the verdict" since all was brought out by adept defense counsel. The unchecked behavior of the DEA in the instant case, however, has deeper and more incidious impact on all verdicts. Indeed, the Third Circuit opinion herein recognized that attempts to disparage defense counsel creates the danger of courts becoming "the unwitting instrumentability through which Government agents may interfere with basic constitutional rights." *United States* v. *Morrison*, 602 F.2d at 533. Curiously, the DEA in *Acosta* requested that the Fifth Circuit determine that the judiciary has no power to dismiss an indictment, but the wisdom of the Fifth Circuit is captured in their answer:

> [W]e need not indulge in dictim as to whether the law empowers a District Judge to dismiss an indictment . . . on account of prosecutorial misconduct. We decline the Government's invitation to do so and leave the point for the day when, and if, it arises. . . . 526 F.2d at 675.

See, *United States* v. *Weiss*, 599 F.2d 730 (5th Cir. 1979) (where agents met with defendant on matters not regarding his pending charges, an equivocation attempted in the case before the Court, but Weiss' counsel was not disparaged.)

*United States* v. *Glover*, 596 F.2d 857 (9th Cir. 1979), also supports the Third Circuit's *Morrison* opi-

nion. In *Glover*, the FBI held conversations with the defendant without the consent of the defendant's attorney.

> The facts here are clearly distinguishable from those in *Manning*. The most damaging interference with the attorney-client relationship there was the impression the DEA agents attempted to convey that defendant's counsel was incompetent. The effects of disparaging comments about counsel, particularly where coupled with a warning that reliance on counsel's judgment will not keep the defendant out of jail, can be detrimental to the attorney-client relationship and are easily expelled. [*Id.*, 596 F.2d at 861].

Repeatedly, the DEA rises to the occasion to intimidate, chill and destroy the constitutional rights of our citizens. How is it that their name appears again and again? One can wonder how lengthy the "citations" would be if the DEA's initials could be Sheapardized as in a computer search![8]

In *United States* v. *Owen*, 580 F.2d 365 (9th Cir. 1978), after conviction but before sentencing, the DEA agents approached the defendant who was represented by two lawyers, one of whom gave his consent to the agents to interview the client. The purpose of the visit was to have the defendant cooperate in an investigation of one of his lawyers. Denying the defendant's request

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[8] DEA was correllated with "outrageous, misconduct, shocking, egregious, and perjury" on WESTLAW on 10/22/80 in the Federal Supplement data bank. Forty-seven citations were printed out. There are nine data banks.

for a dismissal of charges, the Circuit Court stated that the judiciary has the power to dismiss indictments to discourage future Governmental impropriety and quoted this Court's decision in *United States* v. *Russell*, 411 U. S. 423, 431-32 (1973) that "we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." This language is prophetic, as it fits the current record.

Clearly, had the Fifth or Ninth Circuits reviewed the record in *Morrison*, the decision would be the same. This is because it is the correct interpretation of the importance of the right to counsel and the adversary system.

Furthermore, the Second Circuit appears to support the Third Circuit's opinion in Morrison. In *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), a co-defendant was an informer and the defendant requested a dismissal without the showing of prejudice. Although the case deals with interception of attorney-client communications, the language relates to the more serious attempts not only to intercept, but also to decimate the attorney-client relationship, stating:

> A *per se* rule must . . . be thought of in terms of sanction against the Government rather than as a search for truth. Illegal wiretapping may be so far beyond the bounds of Governmental propriety that it is offensive to a rule of liberty under law. (*Katz* v. *United States*, 389 U. S. 347, 88 S. Ct. 507, 19

> L.Ed.2d 576 (1967). The use of a dummy defendant, the ultimate in the chicanery of unlawful intrusion, is cut from the same cloth. [Citations omitted]. The intrusion by a paid informer for the avowed purpose of listening to defense secrets is not different. . . .
>
> In all such cases the Government has been treated as ruthless beyond justification. It has stooped to conduct well below the line of acceptability. These strictures, while legal principles in constitutional terms, are also moral judgments. They assess the guilt not of the defendant but of the Government. The Supreme Court in the Hoffa case considered *Coplon*, *supra*, and *Caldwell*, *supra*, so strongly urged upon us by appellant, as cases which "dealt with government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel." *Hoffa* v. *United States, supra,* 385 U. S. at 306, 87 S.Ct. at 416. When the Government is found guilty of such a charge, the dereliction is more than the bungling of the constable, in Judge-Cardozo's phrase. *People* v. *Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). *It is a corrupting practice which may justify freeing one guilty person to vindicate the rule of law for all others.* See Mr. Justice Holmes dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 469 S.Ct. 564, 72 L.Ed. 944 (1928). [Emphasis Supplied, *United States* v. *Rosner*, 485 F.2d at 1227].

Indeed, inherent prejudice can be found upon consideration of the fact that by not accepting the overtures of the agents, the Respondent, for example: (a) did not receive the benefit of leniency which was covertly pro-

mised to her by the agents; (b) the possibility of a lenient recommendation by the United States Attorney at her sentencing was lost as promised by the agents in their threats; (c) after the agents conduct was completed, all future decisions of her and her counsel become tainted in that she will never know whether she would have received a lessor sentence had she cooperated; (d) the conduct prejudiced the strength of her counsel's ability to maintain his office and execute his duties as the Respondent's chosen attorney; and finally (e) the agents' threats and disparagements irreparably tainted and beclouded the Respondent's right to rely on unencumbered and trustworthy advice from her counsel to an incalculable degree.

**C.**

The Third Circuit's rule remedies the ongoing Governmental misbehavior in the case in chief and in other reported and unreported cases.

There is a line of reasoning in factual circumstances involving interception of attorney-client communications that dismissal would be appropriate if the activity is considered "widespread." *E.g., Weatherford* v. *Bursey, supra; cf., United States* v. *Broward*, 594 F.2d 345, 351 (2d Cir. 1979), cert. denied, _____ U.S. _____ (1979). Keeping in mind that the aforesaid cases do not involve an attempt to decimate the attorney-client relationship, the mere existence of the cases demonstrates widespread activity.

Second, the Government's Petition for Certiorari in the case before the Court implicitly admits the existence of other unreported cases. "[T]he Court of Appeals' ruling can be expected to produce significant delay in a substantial number of future criminal cases," Government's Petition, p. 10; and, "may perceptibly increase the already heavy burden on the federal criminal process by giving rise to a large number of motions. . . . "*Id.*, p. 22. This is the same reason offered by the Government against the relief granted in *Miranda* v. *Arizona, supra*. Furthermore, the granting of relief without a showing of prejudice as referred to in *Rosner, supra*, is not novel. See *Strunk* v. *United States*, 412 U.S. 434 (1973); *Barber* v. *Municipal Court*, 157 Cal. Rptr. 664 (1979).

United States Attorney Peter Vaira's letter also reveals a pattern of conduct in that the conduct has its own administrative regulations. According to Mr. Vaira, (A. 217a to 219a), a letter was sent to all federal agencies warning that before "contact" is made with a defendant, permission must be given according to their guidelines from the U.S. Attorney. No mention is made concerning the limits on such contact, so agents could still repeat what occurred in *Morrison*.

Fourth, in the Appendix attached to the Brief for the United States in *Morrison* a letter from Charles B. Renfrew, Deputy Attorney General, shows that the insidious undermining of the counsel rights of the accused is pervasive and widespread. The letter is in response to *United States* v. *Glover*, 596 F.2d 857, cert. denied, 444

U.S. 860, where FBI agents merely interrogated an accused without permission of counsel. No disparagement occurred, nor were any attempts made to undermine the accused's ability to present evidence in a court of law without fear of re-arrest, nor was the judge slandered, nor did it take place in the accused's home, as in *Morrison*. The interesting point the letter shows is the averment that what occurred on November 2, 1977, to Robert Glover was *also* "most unusual and do not typify the kinds of contacts between agents and represented defendants. . . ." Remember what Mr. Vaira wrote regarding *Morrison*: "I am confident that the improper conduct was an isolated incident." Was it isolated because the attempt to decimate the attorney-client relationship strolled into the courthouse itself? Because what occurred to *Morrison* was indeed different in quality and quantity to *Glover, supra*.

The Renfrew letter goes on in the same manner as Vaira's letter. He recognizes that interviews with people accused of violations of the law are necessary to prosecute offenses against the United States. This is accurate. Interviews are necessary, interrogations and inquisitions are too.

He reveals further that:

> [W]e believe that government lawyers and agents should avoid any discussion relating to pending charges with a represented defendant unless they have received the consent of his attorney. We believe this policy is important in order to promote the effectiveness of the attorney-client relationship

> between a defendant and his counsel. Prosecutors and agents have been, and will continue to be, sensitized to this general principle. [Brief for the United States, p.2a, *United States* v. *Morrison*, No. 79-395]

Thus, the prosecutor is the protector of the attorney-client relationship; and, as all protectors, they are above it, and can create exceptions to the policy of promoting effectiveness of defense counsel. The letter, expectedly, then indicates the exceptions to effective defense counsel.

> [T]here may be circumstances where the government is seeking information critical to the safety of life or limb-for example, the location of a kidnapping victim-from a represented defendant and there is substantial reason to believe that the presence of counsel will delay or impede the flow of the needed information. This should be a rare case and should be undertaken only when those in *supervisory positions are convinced there are no feasible alternatives.* [Emphasis Supplied, Brief for the United States, p. 4a]

The Court ought to remind the Government who the supervisors are as soon as possible!

## CONCLUSIQN

The opinion of the Third Circuit is correct. It is consistent with all known reported cases. The issue presented to this Most Honorable Court must focus primarily on the adversary system and secondarily on the position of the Respondent after the intrusion. *Weatherford, supra* 429 U.S. at 562. Dismissal is the only

remedy otherwise the Government's behavior is sanctioned.

A reversal of the Third Circuit's decision will sanction the behavior of the DEA in this case. All Government agencies will then be allowed to seek to dismiss those defense attorneys who do not assist the Government's investigators of criminal conduct. If the importunings of the agents are successful, defense counsel becomes an agent of the Government, instead of the defendant. It opens a pandora's box recognized in this Court's language when attempts are made to make "nice calculations" as to the effect on the attorney-client relationship. *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). Conceivably, the defense attorney selected by the Government may be an unwitting instrumentality of the DEA. One can imagine DEA agents referring defendants to inexperienced or easily intimidated counsellors for their own purposes. It could also legitimize the spector of corrupted defense attorneys working directly with the DEA. *Cf., Messelt* v. *Alabama*, 595 F.2d 247 (5th Cir. 1979) (defense counsel asks prosecutor to increase charges against defendant so he could collect his fee).

To sanction or allow the Government to subvert a citizen's confidence in counsel of her choice, also places the entire judicial system in the hands of the DEA. Indeed, the Courts themselves become an unwitting instrumentability in the corruption of the judicial system. This corruption is clearly exemplified in this case. The record throughly demonstrates that the Government lied to the Court about the involvement of their agents in the

attempt to disparage the competence of defense counsel, and sought to convince the trial court that the effectiveness of counsel was not discussed. The only reason the Government was unable to hide and cover-up the magnitude of the agents' dispicable acts was due to their fear of discovery and perjury charges when they thought their conversations with the Respondent were on tape.

The prosecutor was motivated to continue the ruse. The record reveals a calculated and concerted effort to determine what was contained on the tapes by utilization of search warrants, contempt citations, threats of arrest and loss of defense counsel's license to practice (A. 193a). The purpose of this action was to avoid full disclosure of misconduct. The prosecutor enticed and enlisted the court in these endeavors. The investigatorial and prosecutorial misconduct was deliberate, wrongly motivated and unjustified in this case. It clearly interfered with the attorney-client relationship and constituted a violation of the defendant's Sixth Amendment right to effective assistance of counsel. The appropriate and only effective remedy was to dismiss the indictment. The Circuit Court so decided. It did not commit reversable error in so doing.

The decision of the Third Circuit Court of Appeals in this matter should be affirmed.

Respectfully submitted.

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No. 79-395

# In the Supreme Court of the United States

OCTOBER TERM, 1980

---

UNITED STATES OF AMERICA, PETITIONER

*v.*

HAZEL MORRISON

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## REPLY BRIEF FOR THE UNITED STATES

---

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## REPLY BRIEF FOR THE UNITED STATES

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We respond briefly for two purposes: first, to inform the Court of the recent disposition of the civil suits filed by respondent and her attorney as a consequence of the events at issue in the present case; and second, to answer several unfounded assertions made in the brief of the National Legal Aid and Defender Association (NLADA) as amicus curiae in support of respondent.

1. In the petition for a writ of certiorari (Pet. 16 n.10) and in the opening brief for the United States (Br. 35 n.12), we advised the Court that in

August 1979 respondent filed a civil suit in the United States District Court for the Eastern of Pennsylvania (Civ. No. 79-3081), seeking compensatory and punitive damages for the alleged violation of her Fourth, Fifth, and Sixth Amendment rights by agents of the Drug Enforcement Administration in August 1978. In addition, respondent's attorney in the criminal case currently before this Court filed a civil suit of his own in the same district court (Civ. No. 79-3350), seeking damages for the alleged defamation uttered by DEA agents Hopson and Bradley when they spoke with respondent in August 1978.

Both of these civil cases have recently been settled, at the urging of the district court. As part of the settlement in her case, respondent received $4,500, 25% of which was payable to the attorney who represented her in the civil litigation. As part of the settlement in his case, respondent's criminal defense lawyer received $2,000, 25% of which was payable to the attorney who represented him in the civil litigation. Respondent and her defense attorney accepted these sums in full settlement and satisfaction of any and all civil claims that they may have had against the United States or federal agents as a consequence of the events in August 1978 and the related criminal proceedings against respondent. The parties in the civil litigation agreed that the settlement "shall not constitute an admission of liability or fault" on the part of the United States, the defendant DEA agents, or any other federal agents or employees.

2. The NLADA has challenged the government's statements that respondent was not prejudiced by the DEA agents' misconduct in this case (NLADA Br. 2-13). There is no support whatever in the record for amicus's argument. The court of appeals'

opinion does not contain the slightest suggestion that the dismissal of respondent's indictment was based, in whole or in part, on a finding of prejudice. Indeed, the primary point of the opinion is that such a finding is not a prerequisite for the remedy of dismissal. In the court's view, the question of prejudice need not be addressed when there has been a "wrongfully motivated or inadequately justified interference" with the attorney-client relationship (Pet. App. 6a-8a). Respondent, too, does not contend that she was prejudiced by the DEA agents' actions, although she, of course, is the person in the best position to do so.

None of the speculation advanced by the NLADA has any basis in fact. There is no indication in the record that respondent's five-year sentence was the product of "vindictive conduct" by the DEA agents, and we know of no reason to believe that any such conduct occurred. Respondent has never once suggested that she was denied access to the presentence report in her case or that the district court acted in reliance on "confidential sentencing information." Amicus has simply manufactured a series of problems that do not exist and then demanded that the government respond to each one of them. Such injection of nonexistent or irrelevant factual issues at this stage of the proceedings makes no contribution to this Court's resolution of the legal question here presented.

Moreover, the NLADA's brief is inaccurate and misleading when it asserts (Br. 6-8) that respondent was deprived of counsel at plea bargaining and sentencing. Respondent was represented by her present counsel throughout the criminal proceeding against her. Shortly after her first meeting with Agents Hopson and Bradley, respondent informed her at-

torney of the DEA agents' visit and the cooperation they proposed. Respondent also kept her attorney fully apprised of all subsequent dealings with the agents. In fact, defense counsel himself suggested that respondent arrange a second meeting with the agents, and defense counsel was present when respondent telephoned the agents to make an appointment for the following day. The agents did not condition their offer of assistance to respondent on her agreement to dismiss her retained counsel, and respondent has never suggested that she wished to accept the agents' offer and cooperate but that her opportunity to do so was lost after she communicated with her attorney. On the contrary, respondent has voluntarily and steadfastly refused her cooperation, and the record does not contain the slightest hint that she did so against the advice of counsel. Nor is there any reason to believe that the DEA agents' offer of assistance in exchange for cooperation was anything other than genuine. Respondent has not even attempted to argue that the agents sought to mislead her or that they refused to allow her to consult counsel regarding her response to their offer. Any statements or implications to the contrary by amicus are false.

Finally, the NLADA's discussion of "prejudice" (Br. 13) in connection with this case and *Commonwealth* v. *Manning*, 373 Mass. 438, 367 N.E.2d 635 (1977), reveals a fundamental misunderstanding about the meaning of that term in the present context. The nature of the sentence ultimately received by a criminal defendant does not determine whether government misconduct prejudiced the defendant in the sense relevant to the disposition of this case. This case would be no different if respondent had been

sentenced to five weeks' or five months' imprisonment instead of five years'. The critical fact would remain that respondent's criminal prosecution itself, *i.e.*, the legal process leading to her conviction, was not affected in any way by the DEA agents' behavior—and, under the court of appeals' holding, had to be dismissed despite (or perhaps because of) the absence of identifiable prejudice.

For these reasons, as well as the reasons set forth in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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*Solicitor General*

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 333853 175

No. 79-395

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, *Petitioner,*

v.

HAZEL MORRISON, *Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT


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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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No. 79-395

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UNITED STATES OF AMERICA, *Petitioner,*

v.

HAZEL MORRISON, *Respondent.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

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## BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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This brief is filed pursuant to Rule 36 of the Supreme Court rules. Consent to file has been granted by the Solicitor General of the United States, Counsel for the Petitioner, and by Salvatore J. Cucinotta, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court.

## INTEREST OF THE AMICUS CURIAE

National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. The member-

ship of NLADA also includes two thousand individual members, most of whom are private practitioners.

In its endeavor to assure effective legal services to the poor, NLADA also defends against governmental attempts to infringe upon constitutional guarantees, particularly those affecting due process and effective assistance of counsel which are in issue in this case. Too frequently, such incursions affect the rights of the poor and minorities who are least able to defend against them.

This case involves principles which are vital to the defense of indigent persons against unwarranted deprivation of constitutional rights by governmental agents. In defense of what we believe is a threat to the very integrity of the judicial process as well as the constitutional rights of accused persons, we offer the within argument.

## ARGUMENT

### I. The Government's Assertion That Respondent Suffered "No Prejudice" Is Unfounded.

The "Question Presented," as set forth in the government's petition for certiorari and repeated in its brief, assumes a fact not supported by the record, i.e., that ". . . the law enforcement officers' misconduct . . . did not injure respondent in any way." (Petition for Certiorari, p. 2) The Third Circuit did not attempt to assess the prejudice to the respondent, but it focused on the "wrongfully motivated or inadequately justified" nature of the interference with respondent's Sixth Amendment right to counsel. This did not imply, as petitioner seems to suggest, that the Court of Appeals concluded that there was little or no prejudice to the respondent. On the contrary, in referring to its earlier decision

in *United States* v. *Levy*, 577 F.2d 200 (3d Cir. 1978), involving a DEA informer's attendance at a meeting with counsel and disclosure of information, the Court of Appeals indicated that the determination of prejudice was, as in this case, "speculative at best." (*United States* v. *Morrison*, 602 F.2d 529, 533 (1979).)

The petitioner seems to assume from that conclusion that respondent was not injured or not prejudiced "in any way." That assumption, which apparently prompted this Court to grant certiorari and which is the main premise of petitioner's argument, is simply not supported by the record. On the contrary, there is a clear inference, not dispelled by the government, that respondent's heavy, five-year prison sentence may have been the result of vindictive conduct by the DEA agents in retaliation for her refusal to plea bargain without the assistance of her counsel.

The record shows that the DEA agents explicitly threatened that, if the respondent did not agree to "cooperate" as they directed --

> They "could recommend . . . [and] she that *would* get a stiff jail sentence." (A. 110a; emphasis added);
>
> They "would be against [her] one hundred percent." (A. 142a-143a);
>
> She would be sentenced by "the worst S.O.B. in the federal courtroom" who "hate[s] black people." (A. 128a, 144a);
>
> Her attorney "could not present anything to the U.S. Attorney." (A. 143a); and
>
> Her "goddam ass [was] going to jail." (A. 144a).

After she refused to plea bargain without the aid of counsel, respondent did indeed receive "a stiff jail sentence" following her guilty plea to one count of the

two-count indictment. While the record does not indicate that the agents did in fact make good on their threats, neither does it show they did *not* do so nor that her heavy sentence was not the result of vindictive prosecutorial misconduct. It is the government's burden to dispel the appearance of such vindictiveness. (*Cf.*, *Blackledge* v. *Perry*, 417 U.S. 21 (1974).) Having failed to do so, it should not be permitted to argue that respondent was not prejudiced.

It is not unlikely that the agents carried out their threats since adverse "confidential" sentencing information is typically communicated to district court judges by law enforcement officers under Federal Rule of Criminal Procedure 32(c). A recent study of the administration of the "disclosure" requirements of Rule 32(c) indicates substantial abuses by law enforcement agents, including " . . . several instances in which law enforcement agents attempted to 'burn' individuals with unreliable information." (Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts,* 93 Har.L.Rev. 1615, 1658 (1980).)

Further abuses were revealed in a survey of line probation officers who reported that "law enforcement investigative information is most likely to be held confidential, accounting for 33 percent of all information kept confidential," and that

> " . . . [c]onfidential law enforcement information often contains unsubstantiated labels of the defendant -- such as 'major drug supplier' or 'organized crime member' -- or general descriptions of his degree of involvement in illegal activities. Not only are such allegations typically communicated to the court without a sufficient factual basis upon which to judge their reliability, but they are also centrally

> relevant to the sentencing court's determination of the defendant's conduct. This problem is exacerbated by the fact that the sources for this and other information are often law emforcement officials, such as the investigating case agent, who typically are not the original sources of the information and who cannot be completely relied upon for neutral judgment.
>
> "These dangers are compounded by the fact that probation officers usually do not independently verify law enforcement allegations." (*Id.*, at 1656-7; fns. omitted.)

Under these circumstances, the government is in no position to assert that respondent was "not prejudiced" "in any way." Whether or not the agents carried out their threatened retaliatory conduct, such as by the methods reported in the above study, is entirely within the knowledge of the agents and within the constructive knowledge of the petitioner. The government's failure to dispel the clear "appearance" of vindictiveness requires the conclusion that such conduct did in fact occur as in analogous cases of vindictive prosecution. (*Blackledge* v. *Perry, supra*, 417 U.S. 21 (1974).)

In any event, given this state of the record, there is no factual or legal basis whatsoever for the petitioner's assertion that the respondent was not injured or prejudiced "in any way."

## II. The Government's Misconduct Deprived Respondent Of Her Sixth Amendment Right To Effective Assistance Of Counsel.

Petitioner not only asserts that respondent was not prejudiced by the egregious misconduct of the DEA agents, but it even denies that a violation of her right to effective assistance of counsel occurred. Under Point I

of its brief, petitioner suggests the novel position that no matter how egregious, the government's misconduct would not violate a defendant's right to effective assistance of counsel unless incriminating evidence were produced thereby and had a "practical effect" on a defendant's "trial and conviction."

Finding no authority to support this conclusion directly, petitioner attempted to distill it from a variety of decisions in which interference with the right to counsel affected trial proceedings or the guilt-determination phase. None of these cases, however, involved the deprivation of counsel at plea bargaining or sentencing, such as occurred here.

Petitioner's analysis suffers from a view of the right to counsel that is much too narrow. That important right, which is essential to the exercise of all other rights, obviously encompasses more than assistance in the guilt-determination or the "trial and conviction" process. Petitioner's argument ignores the equally (and often more) important functions of counsel at plea bargaining and sentencing.

Mr. Justice Rehnquist stressed these important functions in *Tollett* v. *Henderson*, 411 U.S. 258, 268 (1973), when he remarked that --

> "Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. . . . *A prospect of plea bargaining, the expectation or hope of a lesser sentence*, or the convincing nature of the evidence . . . are considerations. . . ." (Emphasis added.)

The late Mr. Justice Douglas also alluded to these functions in the majority opinion in *Argersinger* v.

*Hamlin*, 407 U.S. 25, 34 (1972), when he wrote, "Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."

This Court has also ruled that the Sixth and Fourteenth Amendments require the assistance of counsel at sentencing. (*Mempa* v. *Rhay*, 389 U.S. 128 (1967).) In this connection, the American Bar Association *Standards on Sentencing Alternatives and Procedures* (Approved Draft 1968) p. 245, points out that assistance of counsel at sentencing may constitute "the most important service of the entire proceedings."

The federal courts of appeals have also ruled that the constitutional right to effective assistance of counsel applies to plea bargaining, and they have reversed convictions for defaults of counsel which deprived defendants of the right to effective representation at that stage. (See, *Mascon* v. *Balcom*, 531 F.2d 717 (5 Cir. 1976); *Correale* v. *United States*, 479 F.2d 944 (1 Cir. 1973); *Cooks* v. *United States*, 461 F.2d 530 (5 Cir. 1972); *Gallarelli* v. *United States*, 441 F.2d 1402 (3 Cir. 1971).)

It is this aspect of the Sixth Amendment right to counsel that was implicated by the misconduct of the agents in this case -- *not* the functions of counsel in the "trial" process. Petitioner's reliance upon decisions involving violations of the latter functions is therefore misplaced.

Not only has petitioner misconceived the legal basis for the Sixth Amendment violation herein, but it has also mistaken the factual basis for the violation. Contrary to petitioner's assertion, the violation of the respondent's right to counsel does not arise from the fact

that the agents merely "questioned her in the absence of her attorney and tried to persuade her to change counsel to facilitate her cooperation. . . ." (Petitioner's brief at 14.) The true operative facts, as shown by the record, are that the agents engaged in plea bargaining and when respondent asked to have her attorney present they openly threatened that she would be punished for not cooperating.

Initially, they promised her leniency, including dismissal of her charges or probation in exchange for her cooperation in apprehending another violator. But if she did *not* "cooperate," they "could recommend . . . [and] she would get a stiff jail sentence." (A 110a.) When she persisted in asking that her attorney be present, the agents became "angry" and "perturbed," threatened that they would be "against [her] one hundred percent," and that she was "going to jail." (A. 112, 117a-118a, 142a-143a.)

The promise of leniency in exchange for respondent's assistance as an informer constituted plea bargaining in its traditional sense.[1] It also constituted a critical

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[1] A defendant's assistance to law enforcement officers by "cooperation . . . in the apprehension or conviction of others is a proper basis for the exercise of prosecutorial discretion to decline to prosecute, notwithstanding that evidence exists which would support a conviction." (ABA, *Standards on the Prosecution Function* (Approved Draft, 1971) Std. 3.9(b) (vii).) As the commentary to the above ABA Standard points out:

> "Prosecutors frequently and properly choose a lenient course with one participant in criminal activity in order to bring other more serious offenders to justice. See Baker, *The Prosecutor -- Initiation of Prosecution*, 23 J. Crim. L.C. & P.S. 770, 788-90 (1933). The under-lying policy is represented in statutes found in many jurisdictions, permitting the grant of immunity from prosecution in exchange for testimony. See, e.g., *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964)." (*Id.*, at 95-96.) (See also, ABA *Standards on Pleas of Guilty* (Approved Draft, 1968), sec. 1.8(a) (b).)

stage of the proceedings for which respondent was entitled to the aid of counsel so that she would "know precisely what [s]he [was] doing, so that [s]he [was] fully aware of the prospect of going to jail or prison, and so that [s]he [was] treated fairly by the prosecution." (*Argersinger* v. *Hamlin, supra*, 407 U.S. at 34 (1972).)

Another complicating factor that further necessitated the aid and advice of counsel was the threat of serious physical danger to Mrs. Morrison and her small children if she agreed to cooperate and became an informant. This danger was referred to by DEA Agent Hopson in connection with the "Marshal Protection Program." He explained to the respondent that this would be available if the agents "felt that her life [would] be in danger or that of her children because of her testimony against a major heroin trafficker." (A. 42a.)

But despite these complexities, the agents insisted that Mrs. Morrison give up her right to the aid of counsel in conferring with them and negotiating the plea bargain or suffer the consequences of their "be[ing] against her one hundred percent" and receiving "a stiff jail sentence." The effect of this was to subject Mrs. Morrison to a cruel trilemma that consisted of the following elements:

1) Cooperate and trust that the agents would deliver a dismissal or probation, but expose her life and the lives of her children to physical danger; or

2) Not cooperate and avoid the danger to herself and her children, but have the agents "against her one hundred percent" and risk "a stiff jail sentence"; and

3) Give up her right to the advice and assistance of counsel in a "critical stage" of the proceedings, to obtain the promised leniency, or

> claim the right and be deemed uncooperative and suffer the threatened consequences.

The agents' refusal to allow respondent to exercise her constitutional right to the aid of counsel in making this critical decision is indisputable. It extended beyond mere personal antipathy toward her retained counsel, Mr. Cucinotta. They insisted that she had to agree first to cooperate, no matter who her counsel might be. As Agent Hopson stated, she was told that "*if she was going to cooperate* with the DEA, it may be advisable for her to obtain a public defender . . ." (A. 104a; emphasis added.)

The agents' insistence that Mrs. Morrison waive her right to counsel or suffer retaliatory punishment was made crystal clear when, by their own admission, they became "perturbed" and "angered" by her refusal to negotiate without her attorney present. (A. 112a, 117a-118a.) In the course of this angry reaction, they told her (according to Mrs. Morrison and undisputed by the government):

> " '. . . We don't need your attorney because your attorney can't do anything *until you decide to agree with us*, and . . . the only way that the U.S. Attorney is going to hear anything that you have to say, you have to make an agreement to cooperate with us.' " (A. 142a; emphasis added.)

When Mrs. Morrison replied that she was still unwilling to enter into the negotiations without her attorney, Agent Hopson angrily retorted:

> ". . . 'We are just wasting our time to keep coming backwards and forth out here if you are not going to cooperate.' . . . 'I am telling you, if you cooperate with me one hundred percent . . . I will be with you one hundred percent, . . . but if you don't cooperate with me, I will be against you one hundred percent . . .' " (A. 143a).

Agent Hopson's parting threat was that her . . . 'goddam ass [was] going to jail' " (A. 144a) — a consequence that she faces if this Court now decides to reverse the Third Circuit.

In the light of these facts, petitioner's contention that respondent suffered no violation of her constitutional right to effective assistance of counsel, let alone prejudice, is utterly frivolous.

### III. The Government's Misconduct Was Intertwined With The Indictment And Polluted The Judicial Process, Necessitating A Complete Dismissal.

In contending that complete dismissal is an inappropriate remedy, petitioner repeats the same unfounded assumption that there was no prejudice to respondent. As indicated above, this contention simply finds no support in the record. With respect to petitioner's reliance on cases involving lesser remedies for evidentiary violations, these are simply not relevant to deprivations of the right to counsel in plea bargaining and sentencing such as occurred here.

This case falls within that class of cases which the petitioner's brief itself describes as,

> "[An] extreme case, where the taint [of government misconduct with respect to the attorney-client relationship] cannot be purged by a new trial . . . to remedy a Sixth Amendment violation. See, *e.g.*, *United States* v. *Levy*, 557 F.2d 200 (3 Cir. 1978); *United States* v. *Peters*, 468 F.Supp. 364 (S.D.Fla. 1979)." (Petitioner's brief at 29.)

It is the kind of case which this Court referred to when it stated:

> "We may some day be presented with a situation in which the conduct of law enforcement agents is so

> outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." (*United States* v. *Russell*, 411 U.S. 423, 431-2 (1973) (maj. op., Rehnquist, J.).)

It also involves what was described in *United States* v. *McCord*, 509 F.2d 334, 349-350 (D.C.Cir. 1974) (en banc), cert. denied, 421 U.S. 930 (1975), as:

> ". . . [S]erious prosecutorial misconduct [that] may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial without regard to prejudice to the accused. . . . [¶] This is so because the principle is not one of fairness to the defendant alone but rather, in Justice Brandeis' words, is one designed to 'maintain respect for law; . . . to promote confidence in the administration of justice; . . . to preserve the judicial process from contamination . . .' "

This case also involves the kind of misconduct and contamination of the judicial process that prompted dismissals by the state courts in *People* v. *Moore*, 57 Cal.App.3d 437, 129 Cal.Rptr. 279 (1976); *Commonwealth* v. *Manning*, 373 Mass. 438, 367 N.E.2d 635 (1977); and *People* v. *Mason*, 97 Misc.2d 706, 411 N.Y.S.2d 970 (1978).

In discussing the latter cases, petitioner appears to concede that the remedy of complete dismissal *was* appropriate in *Mason* and *Moore* because the defendants were "obviously prejudiced" and their "injuries" could not be redressed short of a dismissal. (Petitioner's brief at 41.) However, petitioner contends that *Manning* — "involving a factual situation that resembles the one presented here" — was "wrongly decided" because — "the criminal proceedings against [the defendant], like those against respondent, were not prejudiced in any

way by the wrongful actions of law enforcement officers. . . ." (Petitioner's brief at 41-42.)

We disagree with the assertion that the "factual situation" in *Manning* "resembles" the present case. Unlike *Manning*, the respondent in this case received a very severe prison sentence after being specifically threatened earlier by the agents that if she didn't cooperate and forgo her right to counsel she "would" receive "a stiff jail sentence" and they "would be one hundred percent against her." The only "resemblance" this case has to *Manning* is that it involved a defendant who refused to succumb to threats and disparagement and insisted upon exercising her right to counsel. Such refusal, however, does not mean, as petitioner suggests, that respondent was "not prejudiced."

While the argument of "no prejudice" may be appropriate in *Manning*, where the defendant merely drew a suspended sentence after a trial and conviction, that argument has no foundation in this case, wherein respondent received a heavy five-year prison sentence for an unaggravated offense, following the agents' threats. As previously noted, the government has made no effort to dispel the appearance of vindictiveness with respect to her sentence, and therefore, it is hardly in a position to assert that she was not prejudiced in any way.

But more important and critical to the proper disposition of this and similar cases than the question of prejudice to the individual defendants involved is the matter of prejudice to the judicial process if the courts are permitted to be used in this fashion as "unwitting instrumentalities" for threatening and cajoling defendants to give up their constitutional rights.

Petitioner's argument suggests that relief should be limited to cases of defendants who have been "obviously prejudiced." This suggests that such unlawful conduct in cases of less than "obvious" prejudice would be ignored. These would include cases of "covert" prejudice (such as may have occurred in this case), and cases where judicial relief was not sought because of ignorance, through lack of counsel, or because of fear, through intimidation.[2]

Petitioner's argument, to the effect that relief should be limited to cases of "obvious prejudice" would serve to condone the misuse of the courts as "unwitting instrumentalities" by threats such as were made in this case, i.e., that respondent would be given "a stiff jail sentence" by "the worst S.O.B. in the federal courtroom" who "hate[s] black people." Such unscrupulous, overzealous agents would be unrestrained except in cases of "obvious prejudice." In such cases, defendants like the respondent would continue to be subjected to the "cruel trilemma" of waiving counsel, offending the officers, and exposing self and family to danger and death.

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[2] An example of such intimidation is found in the facts of a recent Ninth Circuit decision in an appeal from denial of a writ of habeas corpus under 28 U.S.C. sec. 2254. (*Mitchell* v. *Superior Court* _____ F.2d _____ (West's Cal. Adv. Serv., p. 326), (9 Cir., No. 79-2502, 10/7/80). The Ninth Circuit panel denied the appeal on jurisdictional grounds, which is now being reconsidered on a petition for rehearing. But the factual allegations set forth in the opinion indicate that after the defendants' public defender was rebuffed by the state officers in seeking information concerning promised leniency for her clients, she objected to their "working" for the officers, and they retaliated by arranging for the revocation of the defendants' pretrial releases, causing one of them to be incarcerated and leading to his serious injury when attacked in the jail for his work as an informant. (See West's Cal. Adv. Serv., p. 328.)

Petitioner's alternative suggestion of limiting relief in such cases to those involving prejudice to the "trial and conviction" process is even more specious. Invariably, such cases involve defendants who are factually guilty of an offense. This provides the officers with the plea bargaining "leverage" needed to enlist the defendant's "cooperation." Conditioning judicial relief in such cases on the basis of prejudice in the "trial and conviction" process would, in effect, be to deny any relief since factual guilt is not an issue in such cases.

The true "prejudice" that defendants such as respondent suffer in these cases when deprived of the aid of counsel in plea bargaining and sentencing was well described in *People* v. *Moore*, *supra*, 57 Cal.App.3d 437, 129 Cal.Rptr. 279 (1976). Like the petitioner in this case, the state contended that Moore, who had obeyed the officers in not informing his counsel about his activities, was not "prejudiced." The defendant argued he had been deprived of counsel in plea bargaining, to which the state replied that there had been no plea bargaining with which counsel could have assisted. The state court of appeal's response is highly pertinent here:

> ". . . The argument is vacuous. The absence of a plea, and the meager benefits Moore received from his unaided bargaining, underscore the prejudicial effect of acting without counsel during crucial pretrial negotiations. It is idle to speculate whether Moore's counsel could have worked out a better deal with the distict attorney. The point is, Moore was entitled to have him try. Lack of effective counsel at a critical stage of proceedings renders them constitutionally defective. (*Anderson* v. *State of North Carolina*, 221 F.Supp. 930, 934-935.) (57 Cal.App.3d at 442.)

The *Moore* opinion is also instructive with regard to petitioner's attempt to compare this case to those involving intrusions into the attorney-client relationship that produce adverse evidence (*e.g., Weatherford* v. *Bursey*, 429 U.S. 545 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964).) On this point, the *Moore* court stated, in language equally applicable here:

> "At oral argument the People likened their intrusion into Moore's relationship with his attorney to a violation of the rights announced in *Miranda* v. *Arizona*, 384 U.S. 436 [1966]. . . . They argue Moore's remedy is to exclude from his trial any evidence gained by their acts in that regard.
>
> "This is not a case where the People have merely failed to advise a defendant of his rights to counsel and have gained evidence from one who has not knowingly waived his right to counsel. What results from a violation of *Miranda* rights is tainted evidence, and the exclusionary rule is adequate to cope with the violation.
>
> "Here the People actively interfered with an attorney-client relationship established to defend Moore against the charges for which he had been jailed. Resort to a rule of evidence cannot reasonably remedy violations of Moore's right to counsel which go to the very conduct of his defense. It is not evidence which has been tainted, rather, it is Moore's right to due process." (57 Cal.App.3d at 442.)

Like Moore, respondent was entitled to the aid of her counsel in the conduct of plea bargaining with the DEA agents. Petitioner's suggested application of evidentiary rules, such as *Miranda, Weatherford,* and *Massiah*, is simply irrelevant and inappropriate here.

*Commonwealth* v. *Manning, supra,* 373 Mass. 438, 367 N.E.2d 635 (1977), involved less egregious miscon-

duct than the present case, but the following thoughtful appraisal of the issue by the Supreme Judicial Court of Massachusetts well explains the need for the drastic remedy of dismissal:

> "Prophylactic considerations assume paramount importance in fashioning a remedy for deliberate and intentional violations of constitutional rights. Such deliberate undermining of constitutional rights must not be countenanced. The specific misconduct present in this case is particularly troublesome because only when the importunings of government agents are unsuccessful will the matter come to the attention of the courts, and there is, in turn, a grave danger that the courts themselves may become the instrumentality through which government agents may effectuate threats to defendants regarding the consequences of asserting constitutional rights. [¶] It may be that the only way to prevent such offensive and deliberate manipulation of criminal defendants is to formulate a per se rule which would mandate the dismissal of an indictment in cases in which government agents intentionally attempt to subvert the attorney-client relationship and the defendant's right to a fair trial. In the case now before us, we find it unnecessary to adopt such a rule. The indictment itself is so inextricably interwoven with the misconduct which preceded it that the only appropriate remedy here is to dismiss the indictment. (367 N.E.2d at 639.)

These views apply with even greater force to the facts of this case. The "prophylactic" rule of dismissal is necessary and appropriate to protect not only the accused, but the very integrity of the judicial system itself.

As indicated by the Appendix to petitioner's brief, referring to *United States* v. *Glover*, 596 F.2d 857 (9 Cir.), cert. denied 444 U.S. 860 (1979), the incidence of

such cases appears to be growing.[3] The government's concern about controlling such misconduct is commendable, but requiring approval of the United States Attorney as indicated in *People* v. *Moore, supra*, (where the district attorney's office itself was involved in the misconduct) provides no assurance whatever that abuses will be avoided.[4]

In order to protect the very integrity of the courts, as well as the constitutional rights of the accused, dismissal in such cases is necessary.

## CONCLUSION

For these reasons, we respectfully request that the judgment of the Third Circuit be affirmed.

Respectfully submitted,

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

By _____

SHELDON PORTMAN
*Public Defender*
Santa Clara County
California

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[3] Additional recent cases involving similar misconduct are: *Mitchell* v. *Superior Court, supra*, _____ F.2d _____ (9 Cir., No. 79-2502, 10/7/80) (now pending on petition for rehearing); *United States* v. *Pascal*, _____ F.Supp. _____ (N.D.Ill., No. 79 CR 98-2, 6/27/79).

[4] Similarly, in *Mitchell* v. *Superior Court, supra*, the state officers continued to act improperly *with* the approval of a deputy district attorney.